No. 14025

CONSOLIDATED BRIEF FOR PETITIONERS AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,024

HENRY A. BERLINER, *Petitioner*

No. 14,025

JOSEPHINE M. BERLINER, *Petitioner*

No. 14,026

ROBERT B. FRANK, Trustee for Cora A. Berliner Cunningham, *Petitioner*

No. 14,027

ROBERT B. FRANK, Trustee for Josephine L. Berliner Vargas, *Petitioner*

No. 14,028

ROBERT B. FRANK, Trustee for Henry A. Berliner, Jr., *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

Petitions for Review of Decisions of the District of Columbia Tax Court

United States Court of Appeals for the District of Columbia Circuit
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QUESTIONS PRESENTED

(1) Whether sums in excess of par or stated value of stock received by a stockholder upon the dissolution and liquidation of a corporation, are excluded from income under D. C. Code 47-1557a (a) as from capital assets defined in Sec. 1551c(e11) when the stockholder owned the stock for more than two years prior to liquidation and dissolution, or whether said sums are taxable as "dividends" under Sec. 1551c(m).

(2) And whether D. C. Code 47-1551c(m) is in violation of the Fifth Amendment, when, without regard to (a) presumption contrary to fact, or (b) the gain or loss realized by a stockholder, or (c) arbitrary classifications among taxpayers, said section is construed to require inclusion in gross income of the stockholder, as "dividends," sums in excess of par or stated value of stock of the corporation, received by the stockholder upon liquidation and dissolution of the corporation.

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No. 14,024

HENRY A. BERLINER, *Petitioner,*

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Petitions for Review of Decisions of the District of Columbia Tax Court

CONSOLIDATED BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

On May 15, 1957, the District of Columbia Tax Court filed Findings of Fact and Opinion in which it denied petitioners' Petitions for refund and cancellation of income taxes (J. A. 2, 45, 46, 47, 49, 51, 53). Petitions for review in this Court were filed on June 19, 1957, and consolidated transcripts of record were filed here on July 18, 1957. This Court has jurisdiction under the provisions of Title 47, Sec. 2404, D. C. Code (1951 Ed.), Act of May 16, 1938, 52 Stat. 371, as Amended. On July 29, 1957, on petitioners' Motions in this Court the cases were ordered consolidated for briefing and argument.

STATEMENT OF THE CASE

Engineering and Research Corporation, a Maryland corporation, which conducted its business in that State, hereinafter called "ERCO" (J. A. 22, 27), liquidated during 1954 and in the same year dissolved in the State of Maryland (J. A. 7, 25). The liquidation and dissolution followed the sale of ERCO assets to ACF Industries, Incorporated (hereinafter termed "ACF"), for the sum of Three Million Dollars ($3,000,000) (J. A. 12, 22, 23) over and above all liabilities of ERCO, which ACF assumed and paid (J. A. 12, 13, 14). The purchase price, except for ten thousand (10,000) shares of ACF stock (not material here) (J. A. 30) was cash (J. A. 30). ERCO distributed the proceeds of sale to stockholders in 1954 (J. A. 8, 9, 23, 24). The stockholders are petitioners here except one, Lester A. Wells, who is not a party (J. A. 22).

The stockholders, hereinafter called petitioners, are Henry A. Berliner, his wife, Josephine M. Berliner, and Robert B. Frank, Trustee for the three children of Mr. and Mrs. Berliner, namely Cora Anne Berliner Cunningham, Josephine L. Berliner Vargas and Henry A. Berliner, Jr. (J. A. 5, 21). Mr. Frank is entitled to the same relief, if any, as his predecessor Trustee, Josephine M. Berliner

(J. A. 6, 7). When ERCO distributed its assets to its stockholders, the Assessor included in the income of each of them the pro rata share of each in the surplus of ERCO reflected on its books (J. A. 19, 24) without distinction as to the surplus which had been earned by ERCO from its operations to the date of sale, $613,628.54, and the remainder of the purchase price of the business. The remainder of the purchase price of the business represented increment in value of the assets over the years prior to the sale (J. A. 26, 30).

Each petitioner owned the following number of shares of the capital stock of ERCO (J. A. 6, 10):

	Number of Shares	Cost of Shares at $100 each
Henry A. Berliner	50	$5,000.00
Josephine M. Berliner	10	1,000.00
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	10	1,000.00
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	10	1,000.00
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	10	1,000.00

The pro rata share of each petitioner in the assets of ERCO distributed in complete liquidation, including the cost of the shares owned by each of the petitioners, amounted to the following (J. A. 9, 24):

Henry A. Berliner	$1,284,582.50
Josephine M. Berliner	256,916.50
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	256,916.50
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	256,916.50
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	256,916.50
	$2,312,248.50

The inclusion of the foregoing amount (less the cost of the shares owned by each petitioner) in the respective 1954 income of each of petitioners by the Assessor resulted in

the tax for which Petition for refund and cancellation was filed in the District of Columbia Tax Court by each petitioner.

Each of petitioners acquired his shares on January 2, 1937 and continuously owned the shares from that date until December 9, 1954 (J. A. 5, 6, 22), when each of them delivered his shares to ERCO in order to obtain the pro rata share of each of them in the assets of ERCO, then in liquidation (J. A. 8, 23) pursuant to resolutions of the Board of Directors of ERCO duly adopted on December 9 and 21, 1954 (J. A. 7).

On July 20, 1956 the Assessor assessed income taxes for the calendar year 1954 against petitioners in the amounts and with interest thereon as follows (J. A. 27):

Petitioner	Income Tax	Interest
Henry A. Berliner	$51,183.30	$3,881.23
Josephine M. Berliner	9,933.11	753.23
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	10,082.66	764.57
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	10,082.66	764.57
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	10,082.66	764.57

The foregoing income taxes and interest were paid by petitioners on July 30, 1956 (J. A. 27). Petition for refund was duly filed by each petitioner in the District of Columbia Tax Court on September 12, 1956 (J. A. 27).

STATEMENT OF POINTS

1. Stockholders of more than two years' standing when receiving proceeds of liquidation and dissolution of a corporation do not receive "dividends" within the statutory definition thereof, but on the contrary receive sums growing out of the ownership or interest in capital assets (shares of stock), Title 47, Sec. 1557a(a), D. C. Code, as capital assets are defined (property held by the taxpayer for more than two years), Title 47, Sec. 1551c(e11).

2. Corporate assets received by a stockholder upon liquidation and dissolution of the corporation constitute proceeds of an "exchange" by the stockholder, not taxable when the stock has been held for more than two years.

3. A tax levied upon sums described as "dividends" when the sums so received are not "dividends" is unconstitutional in violation of the Fifth Amendment to the Constitution of the United States.

4. When the Revenue Laws of the District of Columbia are construed to levy a tax upon petitioners, the measure of the tax is the earnings or surplus of the corporation in liquidation or dissolution and not the income or gain derived by petitioners; hence the asserted tax purports to measure the tax on petitioners' income by referring to the income of the corporation, a system in violation of the Fifth Amendment to the Constitution of the United States.

5. To tax as income sums received upon the liquidation or dissolution of a corporation by stockholders of more than two years' standing, but to exempt from income tax the proceeds of sale or exchange of stock held for more than two years, is an arbitrary and capricious classification in violation of the Fifth Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT

As may be seen from a consideration of petitioners' Statement of Points, the argument on this appeal will be divided into five (5) parts and the summary of that argument proceeds accordingly.

(1) Upon the liquidation and dissolution of ERCO in 1954, petitioners owned shares of stock in the corporation which they had held since January, 1937. Thus the shares of stock of petitioners were "capital assets" as defined by the District of Columbia Revenue Acts to "mean any property, whether real or personal, tangible or in-

tangible, held by the taxpayer for more than two years." Title 47, Sec. 1551c (e11).

When petitioners received their pro rata share of assets from ERCO, the sums were not received as "dividends" as the meaning of that term is commonly understood in ordinary usage or as defined by the Courts heretofore.

The District of Columbia Revenue Acts, Title 47, Sec. 1557a(a), exclude from the definition of gross income amounts "derived from . . . sales or dealings in (capital assets) . . . growing out of the ownership, or sale of, or interest in, such property; . . ." (Parenthesis supplied.) Since petitioners received their pro rata shares of assets when ERCO dissolved, the sums they received grew out of "dealings in property," "growing out of the ownership . . . or interest in such property," namely, capital assets, and are therefore excluded from "gross income" as defined above.

The words of the Act, Title 47, Sec. 1551c(m), defining "dividends," contain a proviso referring to amounts received "exempted from tax," which can refer only to the exclusion from tax of proceeds of disposition of capital assets.

The wording of the statute defining "dividends," which is broad enough literally to include the proceeds of liquidation and dissolution as "dividends," need not be followed by the Courts; first, because as stated above other literal words of the statute also apply, and second, because to follow the literal definition of "dividends" would lead to absurd results, not in accordance with the intention of the Congress. Moreover, the "equity of statute" rule of construction grants ample power to the Court to disregard the literal words of the "dividend" definition. That power should be exercised by the Court because sensible administration of the District of Columbia Revenue Acts requires it. If the power is not exercised, the Assessor will levy taxes when taxpayers sustain losses;

and will not levy taxes when stockholders otherwise realize gains. Furthermore, by application of the "equity of statute" doctrine, questions of unconstitutionality, inequality, and injustice will not arise.

(2) Petitioners as stockholders of ERCO were able to obtain their pro rata shares of ERCO assets by delivering their shares of stock to the corporation. The conventional sale or exchange relationship was therefore created and occurred. For forty years the principle of treatment of receipt of proceeds of liquidation and dissolution by stockholders as an exchange or a sale of assets has been accepted under Federal law. That theory, based on common sense, has now become a part of the custom and usage of the tax gatherer in levying and collecting income taxes.

Even before the theory of sale or exchange in this situation was written into the Federal Internal Revenue Laws, the Courts had applied it. The application of that theory was not impeded by the word "dividends" contained in the first Federal Income Tax Law, even though that word was literally broad enough to include distributions by a corporation in liquidation or dissolution.

By applying the "sale or exchange" rule or theory to the good faith liquidation or dissolution of a corporation, which has been done elsewhere in the face of a broad definition of "dividends," the actual gain or loss realized by a taxpayer will be taxed or allowed respectively and all questions of unconstitutionality, inequality, injustice and absurdity are avoided. Sound tax administration of the District of Columbia Revenue Laws requires that result.

Moreover, most of the amounts received by petitioners on liquidation and dissolution of ERCO constituted "capital gains" to ERCO which were exempted from tax to ERCO both under Maryland law, where the corporation conducted its business, and under the law of the District of Columbia, as well as under the Internal Revenue Code

of 1954. Thus it is not only fair but requisite to find and hold that the public policy of the District of Columbia exempts from tax sums received by stockholders of more than two years' standing upon liquidation and dissolution of a corporation, ownership of which is evidenced by the shares.

(3) Sums received by petitioners on the liquidation and dissolution of ERCO were not "dividends" within the customary and usual meaning of the term. Petitioners received money as a result of the delivery of their shares of stock to ERCO, in fact a sale or exchange. If the definition of "dividends" contained in the District of Columbia Revenue Acts be construed to create a conclusive presumption that sums obtained by petitioners were dividends, when in truth and in fact those sums were not dividends, then the District of Columbia definition of dividends is in violation of the Fifth Amendment to the Constitution of the United States.

(4) The definition of "dividends" in the District of Columbia Revenue Acts purports to measure a tax on stockholders of a corporation, after the corporation liquidates and dissolves, not by the gain or loss realized by the stockholder, but by the amount of profit accumulated by the corporation. Thus the tax upon stockholders of a corporation is not measured by the income of the stockholders, but by the income of the corporation, a third party. To attempt to levy an income tax upon stockholders of a corporation, on the basis of the earnings of the corporation, rather than the gain or loss realized by the stockholders, is to attempt to tax individuals because of the earnings of someone else, namely, the corporation, a taxing system heretofore held to be unconstitutional, in violation of the Fourteenth Amendment, the standards of which have been held to be identical, in this situation, with the standards of the Fifth Amendment to the Constitution.

(5) When stockholders of a corporation, on liquidation and dissolution, receive their pro rata distribution of assets from the corporation and in order to obtain that distribution, transfer title to their shares of stock the stockholders convey title to their stock in exactly the same way that stockholders convey title to their stock when they dispose of it by sale or exchange.

The District of Columbia Revenue Acts exclude from income the proceeds of sale or exchange of shares of stock which have been owned for more than two years. To exclude from tax, proceeds of sale or exchange, but to levy a tax upon receipt of proceeds of liquidation or dissolution of a corporation, when the incidents of the transaction are the same, with no differences in fact between them and no possible reason for a distinction between the two transactions, would constitute an arbitrary and unreasonable classification among taxpayers in violation of due process of law. Petitioners have borne the burden of establishing the foregoing arbitrary and unreasonable classification and have negatived every conceivable basis which might support it.

ARGUMENT

(1) Stockholders of More Than Two Years' Standing When Receiving Proceeds of Liquidation and Dissolution of a Corporation Do Not Receive "Dividends" Within the Statutory Definition Thereof, But on the Contrary Receive Sums Growing Out of the Ownership or Interest in Capital Assets (Shares of Stock), Title 47, Sec. 1557a(a), D. C. Code, as Capital Assets Are Defined (Property Held by the Taxpayer for More Than Two Years), Title 47, Sec. 1551c(e11).

Upon the liquidation and dissolution of ERCO, petitioners received money and securities as a result of dealings in personal property (corporate stock) which constituted capital assets. From January, 1937, until date of liquidation and dissolution in 1954, taxpayers owned shares of the common stock of ERCO. Thus the sums received by petitioners were received not as "dividends"

but as their pro rata share of assets when ERCO liquidated and dissolved.

The words "capital assets" are defined by the District of Columbia Revenue Acts to "mean any property, whether real or personal, tangible or intangible, held by the taxpayer for more than two years." Title 47, Sec. 1551c(e11).

Under the District of Columbia Revenue Acts "gross income" is defined as including "income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in such property: . . ." Title 47, Sec. 1557a(a). Receipts by stockholder-distributees upon liquidation of a corporation result from "sales or dealings" "growing out of the ownership" in corporate stock, which is a capital asset if held for more than two years. Hence, distribution of corporate assets on liquidation, are "dividends" only if received by the stockholder of less than two years' standing. This interpretation of the District of Columbia Revenue Acts is borne out by the definition of the word "dividend" appearing at Title 47, Sec. 1551c(m) where the word "dividend" is stated to mean:

> ". . . any distribution made by a corporation . . . to its stockholders . . . out of its earnings, profits, or surplus (other than paid-in surplus), . . . and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: *Provided, however,* that in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation *and not exempted from tax under this article,* the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution . . ." (Italics added.)

The proviso of Sec. 1551c(m) to which attention is invited by the use of italics, would have been included in the Revenue Acts only if the exemption from tax had a distinct meaning, in relation to the exclusion from gross in-

come set out in Sec. 1557a(a). If the proviso were limited to the specific "section" in which it appears, instead of being intended to apply to the entire "article" (body of taxing laws) it would have said so. Article I of the Act of July 16, 1947 (61 Stat. 331, *et seq.*, ch. 258, Art. I), includes Sections 1551c(m), 1557a(a), and 1551c (e11). (Subsequent amendments have no effect upon the accuracy or soundness of this reasoning.)

The opinion below utterly fails to take into account the proviso mentioned in the foregoing paragraph. The proviso, its meaning or effect, is not even mentioned. Indeed, in setting out the words of the statute defining dividends, the portion of the statute containing the proviso was omitted (J. A. 29). Thus, it can only be assumed that the effect of the proviso in the interpretation of the definition of "dividends" was ignored below.

In a situation similar in statutory construction, the Supreme Court of the United States has had occasion to point out that the general section of the Income Tax Act of September 8, 1916, defining "gains" is determinative of whether or not an income tax liability is incurred. The general statute was qualified by a specific provision, Section 2(c), which required that "for the purpose of ascertaining the gain derived from the sale or other disposition of property . . . the fair market price or value of such property as of March 1, 1913, shall be the basis for determining the amount of such gain derived." Yet when the holder of shares of stock which on March 1, 1913 had diminished from original cost, sold his shares for a sum in excess of the value on March 1, 1913, no taxable gain was realized when the sale was for a sum not in excess of original cost. The Court expressly ignored the specific section of the Act of 1916 which defined gains as the difference between selling price and March 1, 1913 value, because the general section of the Income Tax Act was held to govern as the expression of the intention of Congress to levy a tax at all. *Goodrich* v. *Edwards*, 255 U.S. 527,

65 L. Ed. 758 (1921); *Walsh* v. *Brewster*, 255 U.S. 536, 65 L. Ed. 762 (1921).

Applying the Supreme Court's requirement for consideration of the general taxing statute in defining taxable income, the District of Columbia Acts in Section 1557a(a) exclude "capital assets" or "sales or dealings" "growout of the ownership or sale of, or interest in such property." Thus the specific definitions of Section 1551c(m) are not to be employed, within the meaning of the decisions of the Supreme Court, to expand into income or dividends, those items of taxpayer's property which by virtue of the general section are not properly includable.

It is therefore abundantly clear that a stockholder of more than two years' standing is not taxable upon his pro rata share of corporate assets received by him upon liquidation and dissolution.

It is true that Section 1551c(m) includes within the definition of the word "dividend" distributions "made by a corporation . . . whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: . . ." Those words can mean only that actual "dividends" are taxable as such when received by stockholders whether in liquidation or dissolution or not. For instance, defaulted dividends on cumulative preferred stock, received prior to, during, upon or after liquidation, would be taxable as dividends; or dividends otherwise declared prior to liquidation and dissolution would be taxable as such, whether paid prior to, during, upon or after liquidation of a corporation. No intention should be imported to the Congress to include within the meaning of the word "dividends" the actual capital sums paid out by a corporation on a liquidation or dissolution.

It is also true that Section 1551c(m) in defining "dividends" contains words which are broad enough to include sums received by stockholders in liquidation or dissolution of the corporation, because that section of the statute

uses the two words "any distribution," and obviously when the corporation liquidates or dissolves it *does* make a "distribution" of its assets among its stockholders pro rata. The Court then is confronted with the necessity for a choice between (1) construing Section 1551c(m) to include a "distribution" as taxable when made by a corporation in liquidation or dissolution, or (2) finding that it was the intention of the Congress to exclude that "distribution" of assets from tax when that "distribution" is received on account "of the ownership" of capital assets, such as corporate stock held for more than two years. Both sections of the statute contain language broad enough to apply to the case at bar. Section 1557a(a) by its literal terms excludes from tax the sums received by petitioners because, as heretofore stated, the sums were received from "dealings" or "growing out of the ownership" of corporate stock, which is a capital asset if held for more than two years.

Of course the learned Trial Judge was, and this Court is, empowered to disregard the literal language of the dividend definition contained in Section 1551c(m) because it is a generally accepted canon of construction to exclude from the letter of a statute, acts not within its spirit, and not intended by the legislature to be governed thereby.

In the District of Columbia, the most recent application of the rule is found in *Manoukian, et al.* v. *Tomasian*, ... U. S. App. D. C. ..., 237 F. 2d 211 (No. 12,907, September 20, 1956), where the Court said (at pp. 213, 214):

> "We think such a holding is proper here, under established principles. 'It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the Reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in

> question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, *or of the absurd results which follow from giving such broad meaning to the words*, makes it unreasonable to believe that the legislator intended to include the particular act.' Holy Trinity Church v. United States, (1892), 143 U. S. 457, 459, 12 S. Ct. 511, 512, 36 L. Ed. 226. (Emphasis supplied.) Thus has the Supreme Court applied the 'equity of the statute' doctrine[4] to exempt under appropriate circumstances a specific case from broad statutory language."

Footnote 4 of that decision is as follows and includes words equally apt:

> "The development of the doctrine from Aristotle, through Plowden, and into modern jurisprudence is well documented by Judge Frank in Usatorre v. The Victoria, 2 Cir., 172 F. 2d 434, 439-443 & Notes 12-16. 'Where the purposes of the statute can be achieved only by extending the operation of the language of the statute it will be extended, and where the purposes of the statute will be defeated by a literal interpretation of the statute the language will be restricted.' 3 Sutherland, Statutory Construction, Sec. 6004 (3d ed. 1943)."

The Supreme Court of the United States has applied the principle not only in *Holy Trinity Church, supra*, but also in *U. S.* v. *Kirby, et al.*, 74 U. S. (7 Wall.) 482, 19 L. Ed. 278 (1869).

The very full footnotes 12 through 16 contained in *Usattore*, quoted in *Manoukian, supra*, are also pertinent.

The foregoing principles have been applied in the interpretation of tax statutes quite recently. For instance, *Leon Turnipseed*, 27 TC No. 91 (Docket No. 61365, February 8, 1957), 27,91 P-H TC 1957, where the Internal Revenue Code of 1954, Sec. 152, defined dependent as:

> "(9) An individual who, for the taxable year of the taxpayer, has as his principal place of abode the home

of the taxpayer and is a member of the taxpayer's household, or . . ."

The taxpayer, in a meretricious union, was living with an undivorced wife of another man. The taxpayer deducted Six Hundred Dollars ($600) as an exemption for a dependent. He had in fact furnished full support for his paramour who lived in the household. The Commissioner denied the claim for exemption and the Tax Court affirmed. Even though the literal words of the statute permitted the paramour to be considered as a dependent, since she lived with the taxpayer as her principal place of abode, and was a member of the taxpayer's household, the Tax Court refused to adopt a literal construction of Sec. 152(a)(9), stating as follows:

> "In our opinion Congress never intended the specific paragraph in question to be construed so literally as to permit a dependency exemption for an individual whom the taxpayer is maintaining in an illicit relationship in conscious violation of the criminal law of the jurisdiction of his abode."
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> "In so interpreting paragraph (9) we do not intend to hold that its purpose is to be limited to cases falling within the example set forth in the Committee Report, but are here applying the well-settled rule that statutes should receive a sensible construction, so as to effectuate the legislative intention and, *if possible, avoid an absurd conclusion.*" (Italics supplied.)

The same rule was applied in *Robert S. Bassett*, 26 TC No. 77 (Docket No. 52312, June 21, 1956), 26,77 P-H TC 1956. There the taxpayer in December of 1950 prepaid an item for medical services to be furnished a dependent for the ensuing year 1951 in order to gain the benefit of the medical deduction under Sec. 23(x) of the Internal Revenue Code of 1939. The Code section expressly permitted deduction of:

> "Expenses paid during the taxable year . . . for medical care of the taxpayer, his spouse, or a dependent . . ."

The Commissioner disallowed the deduction even though it was within the literal words of the statute and the Tax Court affirmed, stating:

> "Petitioners contend that the contested payment satisfies the two tests specified in the statute, i. e., a payment made in the taxable year and for medical care. We are of the opinion that the section may not be so literally and narrowly construed.
>
> "In *United States* v. *Kirby*, 74 U. S. 482, 486, the Court stated:
>
> > All laws should receive a sensible construction. *General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.* It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." (Italics supplied.)

The reason set out in *Kirby*, *supra*, when considered carefully, is persuasive in the case at bar, 19 L. Ed. 280:

> "The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'That whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the Statute of 1 Edward II., which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding of the passage of the mail, or its carrier, does not apply to a case of temporary detention of

> the mail caused by the arrest of the carrier upon an indictment for murder."

To focus the foregoing rules upon petitioners' cases at bar indicates that even though the District of Columbia contends that the broad words of Title 47, Sec. 1551c(m), D. C. Code, include as taxable, proceeds of the liquidation and dissolution of a corporation, still this Court should not adopt that interpretation of the statute. This Court should construe 1551c(m) to include what is in truth and in fact a dividend and not to include what is in truth and in fact the proceeds of liquidation and dissolution; obviously thereby interpreting the statute in accordance with the intention of the Congress and avoiding absurd or unconstitutional results.

Indeed, this Court has quite recently said in *Hyman* v. *District of Columbia*, .. U. S. App. D. C. .., .. F. 2d .. (No. 13549, decided July 15, 1957):

> "Any other construction of the statute could lead to absurd results which we cannot believe Congress intended."

To construe the statute as was done by the learned Trial Judge below would lead to absurd results and cannot be the basis for a sensible administration of the income tax laws applicable to the District of Columbia. Taxpayers who sustain losses would be taxed for the receipt of their pro rata shares of corporate surplus, and taxpayers who realize gains would escape from tax, because the view adopted by the learned Trial Judge and by the Assessor utterly fails to take into consideration, in construction of the statute, the gain or loss realized by the taxpayer. For example, *a loss which would be taxed as a dividend*: A pays B $100,000 for one-half the stock of X Corporation, which owns net assets of $200,000 represented by capital of $100,000 and earned surplus of $100,000. *After several loss years*, X Corporation has

net assets of only $150,000.00 and liquidates. A receives one-half of the then existing net assets, or $75,000.00, represented by $50,000.00 capital and $25,000.00 earned surplus, his pro rata portion of each. A has actually sustained a loss of $25,000.00; yet according to the Assessor, would be taxable upon $25,000.00 (his pro rata share of earned surplus) as a dividend.

For an additional example, *a gain which would not be taxed as a dividend*: A pays B $100,000.00 for one-half the stock of X Corporation, which owns net assets of $200,000.00, represented by capital of $400,000.00 less incurred deficits in operation of $200,000.00. *After several profit years*, X Corporation has earned $200,000.00 in operations so that its initial capital of $400,000.00 is restored to it. X Corporation then liquidates. A receives one-half of the then existing net assets, or $200,000.00, consisting of all capital, his pro rata portion of then existing net assets. A has actually realized a gain of $100,000.00; yet according to the Assessor, would not be taxable at all because the corporation had no accumulated earnings at time of liquidation.

Obviously the District of Columbia taxing statutes should be construed to levy a tax when gains are realized, if not realized from capital assets, and to permit taxpayers to deduct losses when sustained, if not sustained in the disposition of capital assets, as the same are defined under local law.

On this point the opinion below is entirely silent. No effort was made to deal with the creation of a sound method of administering the local income tax laws, a necessary effort to be made if administration of the taxing system in the District of Columbia is to proceed on an orderly basis.

Investigation has disclosed that no regulations have been issued by any department of the District of Columbia, or by the Assessor, to construe the local taxing statutes in

the respect noted. There is no provision for the taxation of gains in the situation mentioned above, and no provision authorizing deduction of losses in the situation mentioned above, simply because the Assessor takes the view that the statutes are not to be applied in that light.

Respondent is challenged to point out to the Court any vice in the foregoing argument, as well as to explain, if possible, what provision is made for administration of the local taxing laws in the foregoing respects.

For about forty years, as will be shown below, the Federal Internal Revenue laws have treated liquidation or dissolution of a corporation and resultant distribution of its assets pro rata to its stockholders, as a sale or exchange of assets. So the District of Columbia should regard the transaction in like light. It is the only possible sensible construction of the taxing statutes to adopt. When that view is adopted, stockholders who own stock for less than two years must report as ordinary income any gains or profits realized by them on liquidation of a corporation, and would be permitted to deduct losses actually sustained by them in transactions of that character. Taxpayers who own stock for more than two years would not be taxed at all for gains or profits realized on the liquidation or dissolution of a corporation, except for "dividends" received by them prior to, during, upon or after liquidation or dissolution. And by the same line of reasoning, taxpayers who realize losses as a result of ownership of stock after two years, upon liquidation or dissolution of a corporation would not be entitled to deduct those losses from gross income.

It is the foregoing construction of the District of Columbia taxing statutes which petitioners here present to the Court for adoption in the District of Columbia. It is respectfully submitted that a rule of statutory construction should be adopted, in the light of the evident policy of the District of Columbia Income Tax laws, which will prohibit

the Assessor from following his present line of reasoning into the absurd and unjust results mentioned above.

(2) Corporate Assets Received by a Stockholder Upon Liquidation and Dissolution of the Corporation Constitute Proceeds of an "Exchange" by the Stockholder. Not Taxable When the Stock Has Been Held for More Than Two Years.

Petitioners on the 9th day of December, 1954, pursuant to the plan of liquidation and dissolution of ERCO, "did deliver to Engineering and Research Corporation certificates evidencing the ownership of the shares of stock respectively" owned by petitioners. "On said date each of (petitioners) did receive in cash the amounts set forth . . ." (J. A. 8, 23) It is thus established that petitioners did in fact "exchange" their shares in ERCO for their pro rata portion of the assets of the corporation, in liquidation and dissolution thereof.

Upon liquidation of a corporation, when the stockholder delivers shares of stock to the corporation in "exchange" for his pro rata portion of corporate assets, in cash and in kind, the distribution of corporate assets results from an "exchange" of stock, expressly exempted from tax when held for more than two years, by virtue of the provisions of Title 47, Sec. 1557a(b)(11). In this connection, *see Hellmich* v. *Hellman*, 276 U. S. 233, 72 L. Ed. 544 (1928); *Canal Commercial Trust and Savings Bank* v. *Commissioner*, 63 F. 2d 619 (5th Cir. 1933).

It is abundantly clear that liquidation and dissolution of a corporation does not result in receipt of dividends by the stockholder-distributees. Under the Federal Act of October 3, 1913, tax was levied upon "dividends" by paragraph B. There appears to have been no sections of the October 3, 1913 Federal Law which described receipt of property upon liquidation of a corporation by a stockholder-distributee as an "exchange." (This theory was not introduced into federal law until 1917. *Historical Note*, 26 U. S. C. A. 301, I. R. C. 1954.) Hence, considera-

tion of the taxable status of a stockholder under the Act of October 3, 1913, was reviewed by the Supreme Court in its clearest aspect, without limitation to a legal theory of "exchange" thereafter written into the federal taxing system. When the corporation in *Lynch* v. *Turrish*, 247 U. S. 221, 62 L. Ed. 1087 (1918) liquidated and dissolved, a stockholder received proceeds of liquidation, which the Court described as "a dividend in liquidation of the entire assets . . . of the company . . . upon the surrender of his entire interest in the company. . . ." The Court held the proceeds not taxable to the stockholder because it was the simple receipt by the stockholder of an accrual in value of shares, and not a dividend. With this result must be compared an identical case where values had accrued prior to March 1, 1913, and the corporation had thereafter sold some of its assets and distributed proceeds to the stockholders as dividends. *Lynch* v. *Hornby*, 247 U. S. 339, 62 L. Ed. 1149 (1918). In the latter case the Court held that since the stockholder did not surrender his shares and since the corporation continued in business, the sums received by the stockholder constituted "dividends" specifically taxed by the statute, and in reaching that conclusion defined what dividends really are, namely, 62 L. Ed. 1151:

> ". . . Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation. The stockholder is, in the ordinary case, a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him ab extra, and as constituting a part of his income when they came to hand.
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> ". . . In short, the word 'dividends' was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as the tangible and recurrent returns upon his stock, analogous to the interest and rent received upon other forms of invested capital."

Thus, the Supreme Court has adequately distinguished between the situation which results in a stockholder receiving dividends, and the situation which results in the stockholder receiving distributions in liquidation and dissolution of the corporation, at a time before there had been written into the federal taxing system any requirement for treatment of proceeds of liquidation and dissolution as an "exchange." Comparison of these two cases, namely, *Turrish* and *Hornby*, without more indicate that the sums received by petitioners in the case at bar should be considered not as dividends but as the proceeds of liquidation and dissolution of ERCO, flowing from a surrender of petitioners' shares and the receipt of property by them, and in turn exempted from tax when flowing from the ownership of assets held by them for more than two years.

See also Langstaff v. *Lucas*, 9 F. 2d 691 (W. D. Ky., 1925).

Moreover, the Revenue Acts of the District of Columbia should be administered in conformity with the practice employed in the federal system. *Cf. Seaboard Realty, Inc.* v. *D. C.*, 87 U. S. App. D. C. 258, 184 F. 2d 269 (1950).

Under the foregoing interpretation of the definition of dividends contained in the Revenue Acts, a tax *would* be levied upon the surplus of a corporation received by a stockholder of less than two years' standing. In such case although the receipt of the surplus is in fact not a dividend, within the strict legal definition of the term, the surplus would be received in a taxable exchange. Hence, if the statutory definition of the word "dividend" were to be upheld against stockholders of less than two years'

standing, there would be no inconsistent treatment accorded taxpayers under the Revenue Acts. This is true because whether the inclusion of pro rata portion of corporate surplus in gross income were based upon its inclusion as a "dividend" or as the result of an "exchange," taxable income would be included in the gross income of the taxpayer, when the taxpayer owned shares for a period of two years or less.

To construe the Revenue Acts in a manner which excludes from gross income, the pro rata portion of corporate assets received by a stockholder of more than two years' standing, on dissolution of the corporation, would give literal meaning to the exemption contained in the definition of dividend in the first proviso of Title 47, Sec. 1551c(m), as well as the literal words excluding proceeds of "dealings" in real and personal property from gross income under Title 47, Sec. 1551c(e11) as mentioned in Sec. 1557a(a).

In almost a precisely similar situation, Iowa courts so held. *Lynch* v. *State Board*, 228 Io. 1000, 291 N. W. 161 (1940). There the statute also exempted capital gains and defined "dividends" as including any distribution from earnings or surplus.

Contrary to the view of the learned Trial Judge, the definition of dividends contained in the Iowa statute *was* broad enough to include distributions in liquidation or dissolution. The definition of dividends included "any distribution made by a corporation," and thus like the statute in the District of Columbia literally covers distribution on liquidation or dissolution. The opinion below (J. A. 35) refers to the fact that the Iowa provision is not applicable because of a regulation adopted by the State Board, excluding from income tax as a "dividend," the proceeds of liquidation or dissolution of a corporation. This is exactly what should be done in the District of Columbia to avoid the absurd results mentioned above.

Therefore, the Iowa statute *is* identical in meaning and effect to the District of Columbia statute but the action of the Iowa State Board in adopting regulations avoids the situation created in the District of Columbia by the Assessor's imposition of income taxes against petitioners, without adoption of regulations. Title 47, Sec. 1595 (July 16, 1947, 61 Stat. 359, ch. 258, Art. I, Title XVI, § 1) authorizes adoption of regulations but in the situation in the cases at bar the power has seemingly not been exercised.

Moreover, since petitioners clearly exchanged their shares of stock in ERCO for cash and stock of ACF, an "exchange" occurred, which is expressly exempted from tax when the property has been held for more than two years, which has been shown above. In other words, petitioners here contend that this Court should not literally construe Section 1551c(m) of the local taxing statutes to include within its definition of the word "dividends" the "distribution" made by a corporation in liquidation or dissolution, just as the Supreme Court of the United States did not construe the word "dividend" in paragraph B of the Federal Act of October 3, 1913 to include those proceeds of liquidation. *Compare Lynch* v. *Turrish*, *supra*, and *Lynch* v. *Hornby*, *supra*. Contrary to the view of the learned Trial Judge, *James Dobson*, 1 B. T. A. 1082 (1925) appears to be repugnant to the holdings of the Supreme Court in *Turrish*, *supra*, and *Hornby*, *supra*, rather than to follow them. In *Turrish*, *supra*, the Court specifically holds that the distribution received by shareholders in the liquidation of a corporation constitutes "a single and final dividend in liquidation of the entire assets and business of the company." Section B of the Act of October 3, 1913, 38 Stat. 166, ch. 16, included "dividends" in the definition of gross income. Manifestly then *Turrish* holds that distribution in liquidation of a corporation is a "dividend" (albeit liquidating) and notices the imposition of tax upon receipt of "dividends," yet refuses to tax the liquidating dividend, exactly the construction which petitioners here contend to be appropriate under the District of Columbia Revenue Laws. Thus, *James Dobson*,

supra, seems wrongly decided, but the policy behind the decision is easy to see. Had the then Board of Tax Appeals decided *Dobson* other than it did, two taxes would have been levied upon the shareholder instead of one.

Since the treatment of the proceeds of liquidation and dissolution of a corporation has become so clearly fixed in federal income taxing law, it should not be departed from in the District of Columbia, even though the rule may be otherwise, as the learned Trial Judge noted, in Kentucky. The Assessor in the District of Columbia should follow the practice adopted in Iowa, *Lynch* v. *State Board, supra*. There, in the face of a definition of dividends which included "any distribution made by a corporation out of its earnings or profits to its stockholders or members," the State Board nevertheless adopted a regulation (Article 37) to the effect that a liquidating dividend was a return of a capital investment and constituted a sale or exchange of the capital stock. And only by a similar ruling, as has been shown above, can the Assessor escape the absurd and unjust results noted in this brief. Moreover, when ERCO sold its capital assets, the gain it realized was not taxable under the District of Columbia Revenue laws. It is true that the District of Columbia Revenue laws did not apply to the transactions of ERCO, organized under Maryland law and transacting its business only in that state. However, the laws of the State of Maryland create a like exemption. Article 81, Section 276(a) (1951). When petitioners received sums on dissolution and liquidation of ERCO, not taxable to the corporation under the local law of Maryland or the District of Columbia, and indeed not taxable to the corporation under federal law (J. A. 19), plain public policy exempts from the tax the proceeds of the corporation's sale. No public policy would purport to result in tax upon sums received as a result of the ownership or dealings in "capital assets" of petitioners. Thus it is not only fair, but

requisite, to find and hold that the public policy of the District of Columbia exempts from tax sums received by stockholders of more than two years' standing upon liquidation and dissolution of the corporation, ownership of which is evidenced by the shares. The sale or exchange of capital assets is exempted from the tax generally levied by the laws of the District of Columbia upon corporations and individuals. No compelling words of the District of Columbia Revenue Acts require that petitioners be taxed when their corporation liquidates and dissolves. Neither the literal language of the statute, its spirit, nor its intention requires the tax to be levied. Accordingly, the rules which require reasonable interpretation t avoid inequality, injustice or unconstitutionality, and the "equity of statute doctrine," *supra*, result in petitioners being entitled to cancellation of the assessments against them and refunds of the taxes heretofore paid.

(3) A Tax Levied Upon Sums Described as "Dividends" When the Sums So Received Are Not "Dividends" Is Unconstitutional in Violation of the Fifth Amendment of the Constitution of the United States.

To construe the statute in accordance with the view of the Assessor and the opinion of the learned Trial Judge, results in a construction of the statute that would be an unconstitutional, arbitrary and capricious exercise of the taxing power. For instance, a holder of shares of stock of more than two years' standing, may with impunity sell or exchange his shares with third parties, without subjecting himself to tax under the Revenue Acts. Yet, the Assessor here takes the position that the holder of shares of stock of more than two years' standing, may not in truth and in fact exchange his shares of stock with the corporation on liquidation, without incurring tax upon receipt of corporate assets. Even though receipt of corporate assets is in truth and in fact the result of an exchange of stock, the words of the statute would be construed by the Assessor to create a conclusive presump-

tion that the stockholder had not exchanged his stock on liquidation. Arbitrary conclusive presumptions, contrary to fact, have been held to violate the tests of both the Fifth and Fourteenth Amendments to the Constitution. Thus, in *Heiner* v. *Donnan*, 285 U. S. 312, 76 L. Ed. 772 (1932), it was held to be a violation of the Fifth Amendment to the Constitution (by standards held to be identical to those to be applied under the Fourteenth Amendment to the Constitution) for the Congress to prescribe that gifts made by a decedent within two years prior to death were conclusively presumed to be in contemplation of death for purposes of the Federal Estate Tax. If it is unconstitutional for Congress to lay down an arbitrary and capricious rule prohibiting proof that gifts made by a decedent within two years prior to death were in truth and in fact not in contemplation of death, then it is equally an arbitrary and capricious exercise of the taxing power for Congress to lay down a rule that property received in exchange for stock was not so received, simply because the stock was exchanged when a corporation liquidated.

The opinion below did not discuss the foregoing contention of petitioners. Accordingly, petitioners are not aware of the basis upon which the Trial Court failed to sustain the point here raised.

(4) When the Revenue Laws of the District of Columbia Are Construed to Levy a Tax Upon Petitioners, the Measure of the Tax is the Earnings or Surplus of the Corporation in Liquidation or Dissolution and Not the Income or Gain Derived by Petitioners; Hence the Asserted Tax Purports to Measure the Tax on Petitioners' Income by Referring to the Income of the Corporation, a System in Violation of the Fifth Amendment to the Constitution of the United States.

It is to be noted that ". . . any attempt to measure the tax on one person's property or income by reference to the property or income of another . . ." is unconstitutional under the standards of the Fourteenth Amendment to the Constitution of the United States. *Hooper* v. *Tax*

Commission, 284 U. S. 206, 76 L. Ed. 248 (1931). As has been shown, the standards set up by the Fifth Amendment (applicable to federal action) and the Fourteenth Amendment (applicable to state action) are identical. *Heiner* v. *Donnan*, *supra*.

In *Hoeper* v. *Tax Commission*, *supra*, an income tax was laid upon the income of the husband under a state statute which required to be included in the gross income of the husband, all earnings of the wife. Since the husband had not in fact realized income from his wife's earnings, the Court held the state tax to be unconstitutional. Thus, Congress, acting as a state legislature in exercising the power to tax residents of the District of Columbia, must conform to the same standard held by the Court to be required in *Hoeper*, *supra*.

Under the definition of the word "dividend" contained in the District of Columbia Revenue Acts, no recognition is accorded to the actual basis of the stock in the hands of the shareholder receiving distribution on liquidation. In cases where (1) no gain or loss is realized by the stockholder on liquidation, or (2) loss is actually sustained by the shareholder, the Assessor would construe the statutory definition of a dividend in a manner resulting in tax upon the shareholder, as has been shown above.

Thus, in the light of the situations mentioned above, a tax would be laid upon the pro rata share of surplus received by A on liquidation which had been earned by the corporation, rather than earned by himself. His earnings must be reckoned from an initial determination of what he had and what he received in gross dollars. Simply because the corporation may have earned profits does not permit tax to be levied upon A to the extent of corporate earnings, when he has realized no earnings or profits himself. To attempt to tax the earnings of A, on the basis of the earnings of a corporation, is to attempt to tax an individual because of the earnings of someone else, namely,

the corporation, a taxing system held to be unconstitutional in *Hoeper* v. *Tax Commission, supra. Cf. Goodrich* v. *Edwards, supra; Walsh* v. *Brewster, supra.*

The learned Trial Judge did not expressly rule on the foregoing point. Hence, petitioners are not aware of any reason why the rule mentioned in this section of their brief should not be applied to relieve them from the liability thus far imposed upon them.

(5) To Tax as Income Sums Received Upon the Liquidation or Dissolution of a Corporation by Stockholders of More Than Two Years' Standing, But to Exempt From Income Tax the Proceeds of Sale or Exchange of Stock Held for More Than Two Years, is an Arbitrary and Capricious Classification in Violation of the Fifth Amendment of the Constitution of the United States.

In the cases at bar, petitioners did in fact deliver their shares of stock to the corporation and concurrently received back the pro rata sums payable to them upon the liquidation and dissolution of the corporation. Thus petitioners in fact disposed of their interests in their shares of stock and received back money and securities therefor. Petitioners did exactly the same thing that other persons, holding stock for more than two years, may lawfully do without incurring tax liabilities; namely, sell or dispose of shares of stock in a non-taxable transaction.

It is impossible to distinguish between the acts of petitioners, which the Assessor here seeks to tax, and the acts of other persons selling or exchanging shares of stock, which are not taxed. No business or practical reason exists for distinguishing between petitioners and other persons who would not be taxed for acts of identical legal effect: namely, disposition of shares of stock held for more than two years. Hence, if the Court applies the dividend definition contained in the District of Columbia Revenue Act to tax petitioners, it can only be said that there is an arbitrary and unreasonable classification, among taxpayers in viola-

tion of due process of law. *Air-way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 69 L. Ed. 169 (1924); *Martin* v. *District of Columbia*, 205 U. S. 135, 51 L. Ed. 743 (1907); *Nichols* v. *Coolidge*, 274 U. S. 531, 71 L. Ed. 1184 (1927); *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 54 L. Ed. 536 (1910).

The learned Trial Judge appeared to be of the view that *Madden* v. *Kentucky*, 309 U. S. 83, 84 L. Ed. 590 (1940), effectually answered petitioners' claim of arbitrary and unreasonable classification among taxpayers. However, *Madden* v. *Kentucky*, *supra*, recognizes the rule against arbitrary classification, even in the face of finding that there was a reasonable basis for the classification there attacked. For instance, the Court says, 84 L. Ed. 593:

> ". . . Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

In the cases at bar, petitioners believe that the required hostile and oppressive discrimination against particular persons and classes *has* been shown and petitioners further believe that they have effectually borne the burden of attacking the construction of the legislative arrangement adopted below. There can be no conceivable basis to support the construction of the legislative arrangement adopted below. If it be considered that the definition of dividends contained in Section 1551e(m) of the District of Columbia Taxing Act was written for the purpose of including cases like petitioners' cases at bar, to prevent avoidance of tax upon what otherwise would need to be declared out by the corporation as dividends, then it can only be said that obviously local taxing laws of the Dis-

trict of Columbia cannot be concerned with the affairs of corporations which do not do business here, such as ERCO. What a corporation does in California or Kentucky, Iowa or New York, can be of no interest to the District of Columbia Assessor if that corporation does not do business in the District of Columbia. Residents of the District of Columbia who own stock in foreign corporations and who exchange their stock in liquidation or dissolution of a foreign corporation, must be regarded in the same class with local residents of the District of Columbia who sell their stock in foreign corporations because in both cases complete title and ownership of the shares by the stockholder are relinquished. Moreover, the two-year requirement for ownership to permit the stock to be considered as a capital asset effectually bars any kind of schemes to avoid tax on what in truth and in fact may be dividends. *Cf. Collins* v. *Ky. Tax Com.* (*Ky.*), 261 S. W. 2d 303, cited in the opinion below. Respondent below advanced no reasons in support of what petitioners contend to be an arbitrary classification and it is believed respondent will not do so here. Hence, again it may be stated that petitioners have borne the burden laid upon them in *Madden* v. *Kentucky*, *supra*, where the Court said in citing a reason for the classification, 84 L. Ed. 594:

> "... The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection."

The late Chief Justice Hughes thought that the decision in *Madden* v. *Kentucky*, *supra*, should be sustained because "the classification adopted by the legislature rested upon a reasonable basis," 84 L. Ed. 596. In any case, *Madden* v. *Kentucky*, *supra*, may be regarded merely as a disapproval of the application of the "privileges and immunities" clause of the Fourteenth Amendment, because the decision expressly and certainly does not depart from the rule prohibiting hostile and oppressive discrimination against particular persons and classes.

It is true that the opinion below simply states, albeit without reason, that there appears to be no discrimination, arbitrarily or otherwise, in petitioners' cases. Indeed, the opinion of the Trial Court (J. A. 38, 39) points out that more discrimination would arise if petitioners were not taxed, because, says the learned Trial Judge, there would seem to be no difference in levying taxes on earnings and profits of the corporation whether received by stockholders in the form of dividends or in liquidation and dissolution. With this line of reasoning the Supreme Court of the United States has heretofore disagreed. *Cf. Lynch* v. *Turrish*, *supra* and *Lynch* v. *Hornby*, *supra*. However, as a practical matter, there is an obvious difference between receipt of dividends and receipt of proceeds of liquidation or dissolution. In the former instance, stockholders retain their shares, while in the latter, stockholders must convey title to their shares to the corporation, in exactly the same manner as title is conveyed by stockholders who otherwise sell or exchange their stock. It is suggested that the real point of the opinion below is that if petitioners are not taxed on the proceeds of liquidation or dissolution of ERCO as "dividends," they will avoid tax, while if they simply had retained their shares and received dividends to the extent of the earnings and profits of ERCO, a tax would be levied upon them, justifiably and appropriately resulting. Petitioners' simple point is that a tax should be levied upon stockholders of not more than two years' standing who receive the proceeds of liquidation on dissolution of a corporation (to the extent of their gains; not to the extent of the earnings or profits of the corporation), because the gains there realized are not from capital assets; while stockholders of more than two years' standing who realize gains should not be taxed but should be permitted to share the exemption from tax accorded to stockholders in situations of identical legal effect. In no other manner can a sound system of taxation be adopted for the District of Columbia.

CONCLUSION

In view of the foregoing, it is forcefully maintained that the decisions of the District of Columbia Tax Court should be reversed so that the assessments of taxes upon petitioners may be cancelled and respondent ordered to refund petitioners the sums heretofore erroneously paid by and collected from them.

Respectfully submitted,

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APPENDIX OF STATUTES

§ 47-1557. Net income.

For the purposes of this article and wherever appearing herein, unless otherwise required by the context, the words "net income" mean the gross income of a taxpayer less the deductions allowed by this article. (July 16, 1947, 61 Stat. 335, ch. 258, Art. I, Title III, § 1.)

§ 47-1557a. Gross income and exclusions therefrom.

(a) The words "gross income" include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

(b) The words "gross income" shall not include the following:

* * * * * * * * * *

(11) *Capital gains.*—Gains from the sale or exchange of any capital asset as defined in this article. (July 16, 1947, 61 Stat. 335, Art. I, Title III, § 2; May 3, 1948, 62 Stat. 207, ch. 246, § 3; May 27, 1949, 63 Stat. 130, ch. 146, Title IV, §§ 403, 420.)

§ 47-1551c. General definitions.

For the purposes of this article and wherever appearing herein, unless otherwise required by the context—

* * * * * * * * * *

(1) The words "capital assets" mean any property, whether real or personal, tangible or intangible, held by the taxpayer for more than two years (whether or not connected with his trade or business), but do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the end of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(m) The word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: *Provided, however*, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution: . . . (July 16, 1947, 61 Stat. 332, Art. I, Title I, § 4; May 3, 1948, 62 Stat. 206, ch. 246, § 1; May 27, 1949, 63 Stat. 129, ch. 146, Title IV, §§ 401, 402.)

§ 47-1595. Commissioners to prescribe and publish rules.

The Commissioners shall prescribe and publish such rules and regulations, consistent with the provisions of this article, as may be necessary and proper for its enforcement and efficient administration. (July 16, 1947, 61 Stat. 359, ch. 258, Art. I, Title XVI, § 1.)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,024

HENRY A. BERLINER, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*;

No. 14,025

JOSEPHINE M. BERLINER, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*;

No. 14,026

ROBERT B. FRANK, Trustee for Cora A. Berliner Cunningham, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*;

No. 14,027

ROBERT B. FRANK, Trustee for Josephine L. Berliner Vargas, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*;

No. 14,028

ROBERT B. FRANK, Trustee for Henry A. Berliner, Jr., *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

Petitions for Review of Decisions of the District of Columbia Tax Court

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JOINT APPENDIX

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1 DISTRICT OF COLUMBIA TAX COURT

Docket No. 1555

BERLINER, HENRY A., *Petitioner*,

vs.

DISTRICT OF COLUMBIA, *Respondent*.

Counsel: BERNARD I. NORDLINGER, ESQ.
Address: 419 Southern Building,
Washington, D. C.

Docket

1956 Date	Proceedings	Memorandum
9/12	Petition filed. Taxpayer, Counsel for Respondent and assessor served.	Income tax $51,183.30 3,881.23-int. 55,064.53
10/8	Hearing set for October 30. Attorney for petitioner, Corporation Counsel and Assessor served.	
10/16	Motion to Consolidate proceedings—Granted Motion for continuance—Granted to Dec. 4. Copies of motions served on Attorneys for petitioner; Corporation Counsel and Assessor.	
Dec. 3	Stipulation with attached exhibits numbered "1" to "10".	
Dec. 4	Hearing—Henry E. Wixon for Respondent.	
1957		
Feb. 11	Brief filed by petitioner, Certificate of Service.	
Mar. 13	Respondent's motion for extension of time for filing brief—Granted—Certificate of service.	
Apr. 12	Brief for respondent—Certificate of service.	
May 7	Reply brief of petitioners—Certificate of Service.	
May 15	Findings of Fact, Opinion and Decision—Assessor, Corporation Counsel and Attorney for Petitioners served.	

June 10—Petition for Review filed by petitioners—Certificate of Service.
June 13—Designation of Record—Certificate of Service.
July 18—Order for Delivery of Original Exhibits—Copies served Attorneys.

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9 Filed Dec. 3, 1956

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1555

HENRY A. BERLINER, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

Docket No. 1556

JOSEPHINE M. BERLINER, *Petitioner*.

v.

DISTRICT OF COLUMBIA, *Respondent*.

Docket No. 1557

ROBERT B. FRANK, Trustee for CORA A. BERLINER CUNNINGHAM, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

Docket No. 1558

ROBERT B. FRANK, Trustee for JOSEPHINE L. BERLINER VARGAS, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

Docket No. 1559

ROBERT B. FRANK, Trustee for HENRY A. BERLINER, JR., *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

10 **Stipulation**

It is hereby stipulated among the parties to these consolidated causes, through their respective counsel of record, that the following facts are true and may be introduced in evidence without formal proof, and shall be considered as saving been duly proved according to law for the purposes of this case and no other matter, pending or future:

1. On July 20, 1956, notice of assessment of a deficiency in income taxes for the year 1954 in the amount of $51,183.30, with interest thereon in the sum of $3,881.23, was delivered to Henry A. Berliner. On July 30, 1956, Mr. Berliner paid said tax and interest thereon under protest. A copy of the notice of assessment (statement of taxes due) is attached to the petition in Docket No. 1555 heretofore filed herein.

2. On July 20, 1956, notice of assessment of a deficiency in income taxes for the year 1954 in the amount of $9,933.11, with interest thereon in the sum of $753.23, was delivered to Josephine M. Berliner. On July 30, 1956, Mrs. Berliner paid said tax and interest thereon under protest. A copy of the notice of assessment (statement of taxes due) is attached to the petition in Docket No. 1556 heretofore filed herein.

3. On July 20, 1956, notice of assessment of a deficiency in income taxes for the year 1954 in the amount of $10,082.66, with interest thereon in the sum of $764.57, was delivered to Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham. On July 30, 1956, Mrs. Berliner as Trustee for Cora A. Berliner Cunningham paid said tax and interest thereon under protest. A copy of the notice of assessment (statement of taxes due) is attached to the petition in Docket No. 1557 heretofore filed herein.

4. On July 20, 1956, notice of assessment of a deficiency in income taxes for the year 1954 in the amount of

$10,082.66, with interest thereon in the sum of $764.57
11 was delivered to Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas. On July 30, 1956, Mrs. Berliner as Trustee for Josephine L. Berliner Vargas paid said tax and interest thereon under protest. A copy of the notice of assessment (statement of taxes due) is attached to the petition in Docket No. 1558 heretofore filed herein.

5. On July 20, 1956, notice of assessment of a deficiency in income taxes for the year 1954 in the amount of $10,082.66, with interest thereon in the sum of $764.57, was delivered to Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.. On July 30, 1956, Mrs. Berliner as Trustee for Henry A. Berliner, Jr. paid said tax and interest thereon under protest. A copy of the notice of assessment (statement of taxes due) is attached to the petition in Docket No. 1559 heretofore filed herein.

6. Henry A. Berliner and Josephine M. Berliner are husband and wife, and residents of the District of Columbia. Cora A. Berliner Cunningham and Henry A. Berliner, Jr. are respectively, the married daughter and son of Mr. and Mrs. Berliner, are adults, and are residents of the District of Columbia. Josephine L. Berliner Vargas is the married daughter of Mr. and Mrs. Berliner, an adult, and a resident of Reno, Nevada.

7. On January 2, 1937, each of the foregoing parties acquired the following number of shares of common stock of the Engineering and Research Corporation, a Maryland corporation, full paid and non-assessable at a cost of $100.00 per share, and each of said parties continuously from that date thence forward owned said shares of stock of said corporation until the 9th day of December, 1954:

SCHEDULE 1

	No. of Shares
Henry A. Berliner	50
Josephine M. Berliner	10
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	10
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	10
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	10

12 8. On the 16th day of July, 1940, Josephine N. Berliner did execute and deliver a certain Declaration of Trust, in writing, dated said date, a copy of which is hereto attached (Exhibit 1). Thereafter, on, to wit, September 12, 1956, as Trustee, she did file her petitions in this Court for a refund of the income taxes so paid by her as Trustee, at the same time that Henry A. Berliner and Josephine M. Berliner, individually, filed their petitions herein.

9. Under the terms of said Declaration of Trust dated the 16th day of July, 1940, in case of the resignation of said Josephine M. Berliner as Trustee, then a substitute Trustee should be appointed by deed of Henry A. Berliner. On, to wit, the 27th day of September, 1956, said Josephine M. Berliner, by her duly executed and acknowledged deed, copy of which is hereto attached (Exhibit 2), did resign as Trustee under said Declaration of Trust. By a certain deed dated the 27th day of September, 1956, copy of which is hereto attached (Exhibit 3), duly executed and acknowledged by him, said Henry A. Berliner did appoint Robert B. Frank, Trustee in the place and stead of Josephine M. Berliner, and did vest in said Robert B. Frank all the rights, powers, duties and authority both absolute and discretionary theretofore vested in said Josephine M. Berliner. Subsequently, pursuant to Motion filed herein on October 16, 1956, Robert B. Frank was substituted in the place and stead of Jose-

phine M. Berliner as Trustee for Cora A. Berliner Cunningham, Josephine L. Berliner Vargas and Henry A. Berliner, Jr. and is entitled to the same relief, if any, as Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham, Josephine L. Berliner Vargas and Henry A. Berliner, Jr., would otherwise be entitled to obtain.

10. Engineering and Research Corporation on the 15th day of November, 1954, under contract dated November 8, 1954, copy of which is attached hereto (Exhibit 4), sold its business to ACF Industries, Incorporated, a New Jersey corporation, and following said date, said Engineering and Research Corporation transacted and conducted no business whatsoever, and carried on no activities of any kind, save and except incident to its liquidation and dissolution.

11. Engineering and Research Corporation on the 26th day of November, 1954, adopted a resolution, a copy of which is hereto attached (Exhibit 5), requiring the dissolution and liquidation of said corporation. Pursuant thereto, said corporation duly filed Articles of Dissolution with the State Tax Commission of Maryland, a copy of which is hereto attached (Exhibit 6). On the 27th day of December, 1954, said Articles of Dissolution were received, approved and recorded by the State Tax Commission of Maryland and on said date, as a result thereof, said Engineering and Research Corporation became and was duly dissolved according to law.

12. On, to wit, the 9th day of December, 1954, and again on, to wit, the 21st day of December, 1954, said Engineering and Research Corporation, pursuant to duly adopted resolutions of its Board of Directors and stockholders, copies of which are hereto attached (Exhibits 7, 8, respectively), did require payment and delivery of its assets (excepting assets reserved to meet claims) pro rata to its stockholders.

13. On, to wit, the 9th day of December, 1954, Henry A. Berliner, Josephine M. Berliner and Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham, Josephine L. Berliner Vargas and Henry A. Berliner, Jr., did deliver to the Engineering and Research Corporation certificates evidencing the ownership of the shares of stock respectively set forth above. On said date each of said persons did receive in cash the amounts set forth below, and the number of shares of common stock of ACF Industries, Incorporated, respectively set opposite the name of each. Said shares of common stock of ACF Industries, Incorporated on said date had a market value at $47.00 per share in the amount respectively set opposite the name of each of said persons:

14 SCHEDULE 2

	Cash	Shares of Stock of ACF Ind.	Cash Value ACF Stock	Aggregate Value Received
Henry A. Berliner	$1,018,750.00	5,000	235,000.00	1,253,750.00
Josephine M. Berliner	203,750.00	1,000	47,000.00	250,750.00
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	203,750.00	1,000	47,000.00	250,750.00
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	203,750.00	1,000	47,000.00	250,750.00
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	203,750.00	1,000	47,000.00	250,750.00
Total				$2,256,750.00

14. On, to wit, the 21st day of December, 1954, the following named persons received in addition to the foregoing sums the cash amounts set out in column (1) of the following schedule:

SCHEDULE 3

	(1)	(2) Aggregate Theretofore Received	(3) Total Received
Henry A. Berliner	30,832.50	1,253,750.00	1,284,582.50
Josephine M. Berliner	6,166.50	250,750.00	256,916.50
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	6,166.50	250,750.00	256,916.50
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	6,166.50	250,750.00	256,915.50
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	6,166.50	250,750.00	256,916.50
Total			$2,312,248.50

15. The foregoing total sums received by the persons set forth in column (3) of Schedule 3 above, constituted the pro rata share of each of said persons in the assets of said Engineering and Research Corporation, delivered in 1954.

15 16. On the date of sale of the business of the Engineering and Research Corporation to ACF Industries, Incorporated, to wit, close of business November 15, 1954, the assets, liabilities, capital and earned surplus of Engineering and Research Corporation consisted of the amounts set forth on the attached balance sheet of said corporation (Exhibit 9).

17. At the beginning and end of the 1954 taxable year of Engineering and Research Corporation, the assets, liabilities, capital and earned surplus of said corporation consisted of the amounts set forth on the attached photostatic copy of balance sheets forming a part of its 1954 Federal Income Tax Return (Federal Form 1120, Schedule L) (Exhibit 10 hereof), and the reconciliation of its taxable income and analysis of earned surplus and undivided profits are as set forth in Schedule M of said income tax return. The item "non-taxable gain resulting from liquidation under Sec. 392(b) IRC-1954 $2,196,371.46" appearing on

said Schedule M of Exhibit 10 is characterized as such for Federal Income Tax purposes and its mere description for that purpose shall have no legal effect upon the tax liabilities of petitioners herein.

18. On, to wit, December 9, 1954, the capital of the Engineering and Research Corporation consisted of $190,000.00, evidenced by 100 shares of common stock of the stated value of $100.00 per share, and 1,800 shares of preferred stock of the par value of $100.00 per share. On December 9, 1954, after redemption of the preferred stock for the sum of $180,000.00, the foregoing stockholders, as part of the sums paid and delivered to them as aforesaid, received the following amounts as capital of the corporation:

SCHEDULE 4

Henry A. Berliner	$5,000.00
Josephine M. Berliner	1,000.00
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	1,000.00
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	1,000.00
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	1,000.00

16 19. The remainder of the total received by each of the foregoing persons, set forth above (Schedule 3, Column 3), was paid and delivered out of surplus of the Engineering and Research Corporation theretofore acquired by said corporation from (1) its operations commencing January, 1937, and terminating November 15, 1954, and (2) the proceeds of sale of its business to ACF Industries, Incorporated, under said Contract of Sale dated November 8, 1954.

20. The deficiency in income tax and interest assessed against and paid by each of the petitioners herein is solely the result of including in revised taxable income of each of them the total each received upon the liquidation and dis-

solution of the Engineering and Research Corporation (Schedule 3, Column 3), less the capital of the corporation each received as set forth above (Schedule 4).

In Witness Whereof, the parties hereto have caused these presents to be executed by their respective counsel of record.

Witness:

King & Nordlinger

..... By Bernard I. Nordlinger
Bernard I. Nordlinger
419 Southern Building
Washington 5, D. C.

..... Charles Kershenbaum
Charles Kershenbaum
327 Southern Building
Washington 5, D. C.
Attorneys for Petitioners

..... Henry E. Wixon

..... Assistant
Corporation Counsel, D. C.
Attorneys for Respondent

Dated: November 30, 1956.

* * * * * * * * * * *

23 **Excerpts From Exhibit 4**

Agreement made as of November 8, 1954, among Engineering and Research Corporation, a Maryland corporation, party of the first part, hereinafter called Seller; ACF Industries, Incorporated, a New Jersey corporation, party of the second part, hereinafter called Buyer; and Henry A. Berliner, Josephine M. Berliner, Josephine M. Berliner, Trustee under Declaration of Trust dated July 16, 1940, and Lester A. Wells, Stockholders of the Company, parties of the third part, hereinafter called Stockholders.

Seller and Buyer agree as follows:

1. *Sale and Purchase of Assets.* Seller agrees that, at the closing hereunder, Seller will sell, transfer and deliver to Buyer, for the consideration provided for in this Section 1, all of Seller's then existing assets and business, as a going concern, including, without limitation, all rights to the use of the name ENGINEERING AND RESEARCH CORPORATION (or any variant thereof) and all patents, applications for patents, trade-marks and licenses.

Subject to the terms and conditions of this Agreement and in reliance on the representations and warranties of Seller and Stockholders contained herein, Buyer will purchase the aforesaid assets and business and, in full consideration therefor, will:

(i) Issue to Seller, or its nominee, 10,000 shares of $25 par value full-paid and non-assessable common stock of Buyer. The certificates of stock issued by Buyer shall be in such denominations and amounts as may be requested by Seller.

(ii) Pay to Seller an amount in cash equivalent to Three Million Dollars ($3,000,000) less the market value of said 10,000 shares of common stock of Buyer computed on the basis of the closing price of said stock on the New York Stock Exchange on the last business day upon
24 which said stock shall be sold on said Exchange immediately preceding the closing.

(iii) Assume and agree to pay and perform the liabilities and obligations of Seller specified in Section 8 hereof.

* * * * * * * * * * *

28 5. *Conduct of Business Pending Closing.* Seller and Stockholders warrant and agree that, pending the closing:

(a) Seller's business shall be conducted only in the ordinary course;

(b) no change shall be made in Seller's Certificate of Incorporation or By-Laws except as may be first approved in writing by Buyer;

(c) no change shall be made in Seller's authorized or issued capital stock;

(d) no dividend or other distribution or payment shall be declared or made in respect of Seller's capital stock, nor will Seller directly or indirectly redeem, purchase or otherwise acquire any of such stock;

(e) no increase shall be made in the compensation payable or to become payable by Seller to any officer, employee or agent, nor shall any bonus payment or arrangement be made by Seller to or with any thereof;

(f) no contract or commitment shall be entered into by or on behalf of Seller, except normal commitments
29 for the manufacture and sale of Seller's products and the purchase of raw materials and supplies;

(g) except as otherwise requested by Buyer, but without making any commitment on Seller's or Buyer's behalf, Seller will use its best efforts to preserve its business organization intact; to keep available to Buyer the services of its present officers and employees; and to preserve for Buyer the goodwill of Seller's suppliers, customers and others having business relations with it.

* * * * * * * * * *

32 Buyer will assume and perform all Seller's contracts and commitments for the manufacture and sale of Seller's products and for the purchase of raw materials, parts, supplies and normal service as the same existed on September 30, 1954 and as entered into
33 after that date in the ordinary course of Seller's business. Without limiting the generality of the foregoing, Buyer will assume and pay all amounts, if any, to become payable by Seller as a result of price redetermination under contracts assumed by Buyer.

In addition to the items specifically referred to above in this Section, Buyer will assume and pay all other liabilities of Seller not specifically excluded in this Section to the extent that the same are reflected or reserved against in said balance sheet to be prepared as of the day immediately preceding the closing date.

The parties recognize that minor claims and liabilities of Seller may arise after the closing which may not be reflected or reserved against in said balance sheet. Accordingly, Buyer agrees that, if and when said claims and liabilities arise, Buyer will pay and discharge the same up to a gross amount not exceeding $25,000.00.

9. *Indemnification by Seller and Stockholders.* Seller and Stockholders, acting pursuant to a plan of complete liquidation heretofore adopted will imdemnify and hold harmless Buyer against and in respect of:

(a) any and all liabilities and obligations of the claims against Seller not expressly assumed by Buyer pursuant to the foregoing Section 3; and

(b) any and all damage or deficiency resulting from any misrepresentation, breach of warranty or nonfulfillment of any agreement on the part of Seller or any Stockholder under this Agreement or from any misrepresentation in or omission from any certificate or other instrument furnished or to be furnished to Buyer hereunder.

34 Anything herein to the contrary notwithstanding, Buyer shall not be relieved from its obligations to consummate the purchase herein contemplated, nor shall Seller or Stockholders be liable to Buyer on the covenants of indemnity hereunder in respect of any breach of warranty, mistake, misrepresentation or other failure on the part of Seller or Stockholders, unless the damage to Buyer as a result of such breach of warranty, mistake, misrepresentation or other failure shall be such as to reduce substantially the net assets to be sold to Buyer to less than

$586,429, the net worth of Seller as disclosed by its above-mentioned balance sheet of September 30, 1954.

The term "net assets" of Seller as used in this Section shall be deemed to mean the book value of the assets of Seller less its liabilities, including in liabilities all reserves and accruals but excluding capital and surplus accounts.

In case damage shall be sustained by Buyer for which indemnity shall be payable by Stockholders, Lester A. Wells shall have no liability to Buyer in excess of ten per cent (10%) thereof; but this provision shall not operate as a bar to maintenance of one or more actions by Buyer against all Stockholders, or less than all Stockholders, in any court of competent jurisdiction.

* * * * * * * * * * *

11. *Covenant Not to Compete.* Each of the Stockholders agrees that, from and after the closing, he will not, (unless acting as an officer or employee of Buyer or with Buyer's prior written consent) and Seller agrees that, from and after the closing, it will not, directly or indirectly, own, manage, operate, join, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business under any name similar to Seller's name, and that, for a period of five years after the closing, none of the Stockholders nor Seller will in any such manner directly or indirectly compete with, or become interested in any competitor of Buyer throughout the United States in any business substantially similar to that now conducted by Seller. Stockholders and Seller agree that the remedy at law for any breach by any of them of the foregoing will be inadequate and that Buyer shall be entitled to temporary and permanent injunctive relief without the necessity of proving actual damage to Buyer.

* * * * * * * * * * *

37 **Exhibit 5**

RESOLVED, that the proper officers of this Corporation be and they hereby are authorized and directed, before January 1, 1955, to wit, during the year 1954, to distribute to the shareholders of the Corporation all of its assets, less assets retained to meet claims, according to the schedule of Distribution in Complete Liquidation filed with these Minutes.

FURTHER RESOLVED, that dividends received by this Corporation on the common stock of ACF Industries, Incorporated, between the date of the adoption of this resolution and the transfer of said shares of common stock of ACF Industries, Incorporated, shall be distributed to holders of the common stock of this Corporation, on a pro rata basis, promptly upon receipt by this Corporation.

FURTHER RESOLVED, that ten thousand (10,000) shares of the Twenty-five Dollar ($25) par value common stock of ACF Industries, Incorporated, full paid and non-assessable, consisting of one hundred (100) certificates of one hundred (100) shares each, shall be endorsed in the name of the Corporation by Lester A. Wells, President, and the corporate seal affixed and attested by Milton W. King, Secretary, and thereafter delivered to the following stockholders of the Engineering and Research Corporation, at their addresses respectively indicated, for delivery by the stockholders of the Engineering and Research Corporation to the Guaranty Trust Company of New York for transfer by the latter, as follows:

Name and Address	Shares of ACF Stock	No. of Certificate
Henry A. Berliner 2841 Tilden Street, N. W. Washington, D. C.	5,000	50
Lester A. Wells 3302 Blackthorn Street Chevy Chase, Maryland	1,000	10

	Josephine M. Berliner 2841 Tilden Street, N. W. Washington, D. C.	1,000	10
	Josephine M. Berliner Trustee for Cora B. Cunningham 2841 Tilden Street, N. W. Washington, D. C.	1,000	10
	Josephine M. Berliner Trustee for Josephine B. Vargas 2841 Tilden Street, N. W. Washington, D. C.	1,000	10
38	Josephine M. Berliner Trustee for Henry A. Berliner, Jr. 2841 Tilden Street, N. W. Washington, D. C.	1,000	10

FURTHER RESOLVED, that this Corporation pay the Guaranty Trust Company of New York the transfer tax incurred in connection with the transfer of the foregoing shares.

* * * * * * * * * * *

RESOLVED, that the proper officers of this Corporation be and they hereby are authorized, as soon as practicable, to proceed with the dissolution of this Corporation and for that purpose to file any and all reports and other documents or instruments required by the laws of the State of Maryland.

39 RE: ERCO DISTRIBUTION IN COMPLETE LIQUIDATION

Proceeds of sale:			
Cash		$2,545,000.	
10,000 shares of common stock of ACF Industries, Incorporated at 45½		455,000.	
Total		$3,000,000.	
Cash on hand		$2,545.000.	
Less cash retained to meet claims, as per list attached		327,500.	
Cash available for distribution		$2,217,500.	
Distribution as follows:			
Retirement of preferred stock, at par		$ 180,000.	
Distribution to holders of common stock		2,037,500.	
Total cash, as above		$2,217,500.	
Distribution schedule:		Cash	ACF stock Shares of
Henry A. Berliner	1800 shares pfd.	$ 180,000.	
Henry A. Berliner	50 shares com.	1,018,750.	5,000
Lester A. Wells	10 shares com.	203,750.	1,000
Josephine M. Berliner	10 shares com.	203,750.	1,000
Josephine M. Berliner, Tr.	10 shares com.	203,750.	1,000
Josephine M. Berliner, Tr.	10 shares com.	203,750.	1,000
Josephine M. Berliner, Tr.	10 shares com.	203,750.	1,000
Total		$2,217,500.	10,000

NOTE: Dividends received, if any, on common stock of ACF Industries, Incorporated to be distributed to holders of ERCO common stock, on a pro rata basis, promptly upon receipt.

40 RE: *ERCO*

CASH RETAINED TO MEET CLAIMS

Provision for liability to ACF Industries, Inc.	
Under contract	$100,000.
Out of tax funds	
Provision for renegotiation	
Expenses of conveying, releases, stamp taxes, etc.	7,500.
Provision for pensions of retired employees	95,000.
Provision for settlement of contract with Leland Miller	25,000.
Provision for expenses of liquidation and dissolution	100,000.
Total	$327,500.

Schedule L.—BALANCE SHEETS. (See instructions)

ASSETS	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
1. Cash		$ 1,109,107.18		$ 198,824.86
2. Notes and accounts receivable	$ 1,913,096.05		$	
(a) Less: Reserve for bad debts		1,913,096.05		
3. Inventories:				
(a) Other than last-in, first-out	$		$	
(b) Last-in, first-out		1,906,651.27		
4. Prepaid expenses and supplies				642,032.93
Receivable A/P - Tax Account				
5. Investments in Governmental obligations:				
(a) Obligations of a State, Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia	$		$	
(b) Obligations of the United States and its instrumentalities				
6. Other investments (Attach schedule)				
7. Buildings and other fixed depreciable assets:	$ 2,253,745.62		$	
(a) Less: Accumulated amortization in lieu of depreciation	6,058.11			
(Line 7 less line 7(a))	$ 2,247,687.51		$	
(b) Less: Accumulated depreciation	1,329,767.51	917,920.00		
8. Depletable assets	$		$	
(a) Less: Accumulated depletion				
9. Land (net of any amortization)		63,822.85		
10. Intangible assets (amortizable only)	$		$	
(a) Less: Accumulated amortization				
11. Other assets (Attach schedule)		336,514.97		
12. Total Assets		$ 5,837,112.32		$ 840,857.79
LIABILITIES AND CAPITAL				
13. Accounts payable		$ 1,119,792.85		$
14. Bonds, notes, and mortgages payable (maturing less than one year from date of balance sheet)		3,485,500.00		
15. Accrued expenses (Attach schedule)		378,335.48		
Provision for claims				
16. Reserves for estimated expenses (Attach schedule)				292,191.73
17. Bonds, notes, and mortgages payable (maturing more than one year from date of balance sheet) Income tax liability				548,666.06
18. Prepaid income (Attach schedule)				
19. Other liabilities (Attach schedule)		609,242.35		
20. Capital stock: Enter number as at end of year— Shares / Shareholders				
(a) Preferred stock	$ 180,000.00		$	
(b) Common stock 10,000.00		190,000.00		
21. Paid-in or capital surplus				
22. Surplus reserves (Attach schedule)				
23. Earned surplus and undivided profits		54,241.64		
24. Total Liabilities and Capital		$ 5,837,112.32		$ 840,857.79

Schedule M.—RECONCILIATION OF TAXABLE INCOME AND ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS

1. Total distributions to stockholders charged to earned surplus during the taxable year:		14. Earned surplus and undivided profits at end of preceding taxable year (Schedule L)	$ 54,241.64
(a) Cash	$ 2,089,165.00		
(b) Stock of the corporation		15. Taxable income before net operating loss deduction and special deductions (Item 31, page 1)	994,281.11
(c) Other property ADP stock	455,000.00		
2. Contributions in excess of 5% limitation		16. Nontaxable interest on:	
3. Federal income and excess profits taxes	908,211.18	(a) Obligations of a State, Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia	
4. Income taxes of foreign countries or United States possessions if claimed as a credit in whole or in part in item 35, page 1			
5. Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary	326.30	(b) Obligations of the United States issued on or before Sept. 1, 1917; all postal savings bonds	
6. Unallowable interest incurred to purchase or carry tax-exempt interest obligations		17. Other nontaxable income (Attach schedule)	
7. Excess of capital losses over capital gains		18. Charges against surplus reserves deducted from income in the return (Attach schedule)	
8. Additions to surplus reserves (Attach schedule)			
9. Other nonallowable deductions (Attach schedule) Provision for claims	192,191.73	19. Adjustments for tax purposes not recorded on books (Attach schedule)	
10. Adjustments for tax purposes not recorded on books (Attach schedule)		20. Sundry credits to earned surplus (Attach schedule)	
11. Sundry debits to earned surplus (Attach schedule)		Non-taxable gain resulting from liquidation under Sec. 332(b) IRC - 1954	2,196,371.46
12. Earned surplus and undivided profits at close of the taxable year (Schedule L)	3,244,894.21		
13. Total of lines 1 to 12	$	21. Total of lines 14 to 20	$ 3,244,894.21

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EXHIBIT 10

The Court: We will receive the stipulation in evidence and have the exhibits to the stipulation numbered as indicated therein.

Mr. Nordlinger: Yes, Your Honor.

The Court: All right.

(Petitioner's Exhibits Nos. 1 through 10 were received in evidence.)

* * * * * * * * * *

The Assessor assessed the petitioners deficiencies in income tax based upon the money and securities received by them upon the liquidation of a corporation in which they were stockholders. The petitioners claim that they received such distribution in the disposition, sale or exchange of their stock, which was a capital asset since it had been held more than two years; and that the gain derived by them was not "taxable income" within the meaning of the District of Columbia Income and Franchise Tax Act of 1947 (Chapter 15 of Title 47, D. C. Code, 1951 Edition). The respondent contends that the distribution was a dividend within the meaning of Section 4(m) of the Act (Section 47-1551c(m), D. C. Code), and therefor taxable.

Findings of Fact

1. The petitioners Henry A. Berliner and Josephine M. Berliner are individuals and residents of the District of Columbia. Robert B. Frank, Trustee, is a resident of the District of Columbia, Cora A. Berliner Cunningham and Henry A. Berliner, Junior, are residents of the District of Columbia; and Josephine L. Berliner Vargas is a resident of Reno, Nevada. The three first mentioned were formerly stockholders in the Engineering and Research Corporation, now dissolved.

2. The Engineering and Research Corporation was a Maryland corporation. It was organized in 1937, and carried on its business activities in the State of Maryland.

3. (a) On January 2, 1937, each of the following named persons acquired the following number of shares of common stock of the Engineering and Research Corporation, fully paid and non-assessable, at a cost of $100.00 per share, and each of said parties continuously
147 from that date thenceforward owned said shares of stock of said corporation until December 9, 1954:

SCHEDULE 1

	Number of Shares
Henry A. Berliner	50
Josephine M. Berliner	10
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	10
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	10
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	10

(b) On September 27, 1956, Robert B. Frank was substituted in lieu of Josephine M. Berliner as the Trustee for Cora A. Berliner Cunningham, Josephine L. Berliner Vargas and Henry A. Berliner, Junior.

(c) In addition to the foregoing stockholdings, Lester A. Wells was the owner of 10 shares of the common stock of the Engineering and Research Corporation. He is not one of the petitioners, nor is a party in any way to these proceedings.

4. On November 15, 1954, pursuant to a contract therefor dated November 8, 1954, Engineering and Research Corporation sold its business and assets to ACF Industries, Incorporated, a New Jersey corporation, for the sum of Three Million Dollars ($3,000,000) payable as follows: 10,000 shares of the capital stock of the purchaser of the closing price thereof on the New York Stock Exchange on

the last business day immediately preceding the closing of the sale transaction, and the difference in cash.

5. Subsequent to the foregoing sale of its business and assets Engineering and Research Corporation conducted no business, and carried on no activities, except those incident to its liquidation and dissolution.

6. (a) On December 9 and 21, 1954, in accordance with resolutions duly adopted, the Board of Directors
148 directed that the assets of Engineering and Research Corporation be transferred to its stockholders pro-rata of stockholdings.

(b) On December 9, 1954, Henry A. Berliner, Josephine M. Berliner and Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham, Josephine L. Berliner Vargas and Henry A. Berliner, Jr., did deliver to the Engineering and Research Corporation certificates evidencing the ownership of the shares of stock respectively set forth above. On said date each of said persons did receive in cash the amounts set forth below, and the number of shares of common stock of ACF Industries, Incorporated, respectively set opposite the name of each. Said shares of common stock of ACF Industries, Incorporated on said date had a market value at $47.00 per share in the amount respectively set opposite the name of each of said persons:

SCHEDULE 2

	Cash	Shares of Stock of ACF Ind.	Cash Value ACF Stock	Aggregate Value Received
Henry A. Berliner	$1,018,750.00	5,000	235,000.00	1,253,750.00
Josephine M. Berliner	203,750.00	1,000	47,000.00	250,750.00
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	203,750.00	1,000	47,000.00	250,750.00
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	203,750.00	1,000	47,000.00	250,750.00
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	203,750.00	1,000	47,000.00	250,750.00
Total				$2,256,750.00

(c) On December 21, 1954, the following named persons received in addition to the foregoing sums the cash amounts set out in column (1) of the following schedule:

149 SCHEDULE 3

	(1)	(2) Aggregate Theretofore Received	(3) Total Received
Henry A. Berliner	$30,832.50	1,253,750.00	1,284,582.50
Josephine M. Berliner	6,166.50	250,750.00	256,916.50
Josephine M. Berliner, Trustee for Cora A. Berliner Cunningham	6,166.50	250,750.00	256,916.50
Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	6,166.50	250,750.00	256,915.50
Josephine M. Berliner, Trustee for Henry A. Berliner, Jr.	6,166.50	250,750.00	256,916.50
Total			$2,312,248.50

(d) The foregoing total sums received by the persons set forth in column (3) of Schedule 3 above, constituted the pro rata share of each of said persons in the assets of said Engineering and Research Corporation, delivered in 1954.

(e) A detailed statement of the distribution of capital and surplus or other assets of the Engineering and Research Corporation is as follows:

DISTRIBUTION IN COMPLETE LIQUIDATION

Proceeds of sale:	
Cash	$2,545,000.
10,000 shares of common stock of ACF Industries, Incorporated at 45½	455,000.
Total	$3,000,000.
Cash on hand	$2,545.000.
Less cash retained to meet claims	327,500.
Cash available for distribution	$2,217,500.
Distribution as follows:	
Retirement of preferred stock, at par	$ 180,000.
Distribution to holders of common stock	2,037,500.
Total cash, as above	$2,217,500.

Distribution schedule:		Cash	Shares of ACF stock
Henry A. Berliner	1800 shares pfd.	$ 180,000.	
Henry A. Berliner	50 shares com.	1,018,750.	5,000
Lester A. Wells	10 shares com.	203,750.	1,000
Josephine M. Berliner	10 shares com.	203,750.	1,000
Josephine M. Berliner, Tr.	10 shares com.	203,750.	1,000
Josephine M. Berliner, Tr.	10 shares com.	203,750.	1,000
Josephine M. Berliner, Tr.	10 shares com.	203,750.	1,000
Total		$2,217,500.	10,000

150 7. In accordance with a resolution duly adopted on November 26, 1954, the Engineering and Research Corporation was formally and effectively dissolved on December 27, 1954.

8. (a) The financial condition of the Engineering and Research Corporation as of the date of sale and transfer of its business and assets to ACF Industries, Incorporated, as reflected by its balance sheet, was as follows:

ASSETS			
Current Assets:			
Cash	$ 694.555.63		
Accounts receivable—trade	2,317,705.77		
Unbilled costs on U.S. Government cost-type contracts	257,881.38		
Inventory, including items shipped but not billed	2,657,888.13		
Insurance claims	351.03		
Advances and charges to vendors	35,023.06		
Advances for employees	557.47		
Deposits—returnable containers	2,774.00	$5,966,736.47	
Fixed Assets:			
Cost	$2,360,065.79		
Reserve for depreciation and amortization	1,414,227.58		
Net book value	$ 945,838.21		
Assets in process of construction	37,682.56	983,520.77	
Other Assets:			
Insurance unexpired	$ 49,325.17		
Advance to employees	4,490.62		
Life insurance—cash surrender value	35,316.25		
Deposit	425.00		
Cash—Employees' bond savings account—contra	20,862.70	110,419.74	$7,060,676.98

LIABILITIES AND CAPITAL

Current Liabilities:			
Accounts payable	$ 441,137.76		
Progress payments on U.S. Government contracts	1,665,167.75		
Billings on U.S. Government cost-type contracts in excess of cost accumulation	125,453.18		
Loan payable, U.S. Government	2,850,000.00		
Accrued interest	4,750.00		
Accrued payroll	217,626.43		
Accrued expenses and commissions	49,037.69		
Accrued Maryland income tax	59,635.29		
Accrued Federal income tax	611,043.42		
Accrued taxes, other	210,817.68		
Unclaimed wages	1,516.54	$6,236,185.74	
Other Liabilities:			
Employees' deposits for U.S. Bonds—contra		20,862.70	
Total Liabilities		$6,257,048.44	
Capital Stock:			
Preferred, Class B, 1,800 shares at par	$ 180,000.00		
Common, 100 shares, no par	10,000.00	190,000.00	
Earned surplus		613,628.54	$7,060,676.98

151 (b) The earned surplus appearing as a debit on the foregoing balance sheet consisted of the following:

Earned surplus, December 31, 1953	$ 54,241.64
Net income, January 1—November 15, 1954	559,386.90
Earned surplus, November 15, 1954	$613,628.54

9. (a) On July 20, 1956, the Assessor assessed income taxes for the calendar year 1954 against the petitioners in the amounts and with interest thereon as follows:

Docket Number	Petitioner	Income Tax	Interest
1555	Henry A. Berliner	$51,183.30	$3,881.23
1556	Josephine M. Berliner	9,933.11	753.23
1557	Josephine M. Berliner, Trustee[1] for Cora A. Berliner Cunningham	10,082.66	764.57
1558	Josephine M. Berliner, Trustee for Josephine L. Berliner Vargas	10,082.66	764.57
1559	Josephine M. Berliner, Trustee for Henry A. Berliner, Junior	10,082.66	764.57

[1] After the assessment and the filing of these proceedings Robert B. Frank was substituted as trustee.

(b) The foregoing income taxes and interest were paid by the petitioners on July 30, 1956.

10. The foregoing income taxes assessed against the petitioners were computed by the Assessor by including in the taxable income of each of them the total each received upon the dissolution and liquidation of Engineering and Research Corporation (Schedule 3, Column 3 in Findings of Fact No. 6 (c)), less the capital of the corporation each received as set forth in Schedule 4 in Findings of Fact No. 6(e).

11. These proceedings were filed on September 12, 1956.

Opinion

The taxes here involved are deficiencies in income tax assessed against the petitioners as former stockholders of Engineering and Research Corporation, a Mary-
152 land corporation, which carried on its business activities in that State, and which for convenience will hereinafter be called "ERCO". The deficiencies were based upon cash and securities received by the petitioners, less amounts representing paid-in capital, upon the sale of ERCO's business and assets to ACF Industries, Incorporated, hereinafter for convenience called "ACF". The Assessor determined that the cash and securities so received (less the capital) was taxable income and assessed deficiencies in income tax accordingly.

The petitioners take the position that no part of the cash and securities represent taxable income. To support their contention the petitioners raise several points, which may be compressed into three, namely, (a) a liquidating dividend is a distribution of capital, is not a dividend and is really an exchange of assets, which being held more than two years are "capital assets" as defined in the law, and the gain is not taxable; (b) if a liquidating distribution is a dividend and therefore taxable under the income tax law, the taxing provision is unconstitutional, because gains from ordinary sale or exchange of "capital assets" is not taxable. In other words the discrimination is violative of the Fifth Amendment to the Constitution; and (c) to hold that the liquidating distribution of a corporation upon dissolution is a dividend and therefore taxable is not in accord with common sense and would lead to absurd results; and that Congress never intended that the word "dividend" should include a distribution of any kind to stockholders upon liquidation or dissolution of a corporation.

The respondent concedes that the portion representing the return of capital is not taxable income, but vigorously maintains that the balance is taxable. The issue thus drawn brings into focus the pertinent sections of the Income and Franchise Tax Act of 1947, Chapter 15 of Title 47, District of Columbia Code, 1951 Edition following:

153 "47-1557. *Net Income.*

> "For the purposes of this article and wherever appearing herein, unless otherwise required by the context, the words 'net income' mean the gross income of a taxpayer less the deductions allowed by this article."

"47-1557a. *Gross income and exclusions therefrom.*

> "(a) The words 'gross income' include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages,

and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

"(b) The words 'gross income' shall not include the following:

* * * * * * * * *

"(11) *Capital gains.*—Gains from the sale or exchange of any capital asset as defined in this article."

"47-1551c. *General definitions.*

"(l) The words 'capital assets' mean any property, whether real or personal, tangible or intangible, held by the taxpayer for more than two years * * *.

"(m) The word 'dividend' means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the Corporation: * * *"

"47-1567. *Definitions.*

"For the purposes of this article, and unless otherwise required by the context, the words 'taxable income' mean the entire net income of every resident, in excess of the personal exemptions and credits for dependents allowed by section 47-1567a and that portion of the entire net income of every nonresident

which is subject to tax under sections 47-1574 to 47-1574e."

"47-1567b. *Imposition and rates of tax.*[2]

"There is hereby annually levied and imposed for each taxable year upon the taxable income of every resident a tax at the following rates:

"Two and one-half per centum on the first $5,000 of the taxable income.

154 "Three per centum on the next $5,000 of taxable income.

"Three and one-half per centum on the next $5,000 of taxable income.

"Four per centum on the taxable income in excess of $15,000."

In the sale of its business and assets to ACF, ERCO received $3,000,000 represented by 10,000 shares of the capital stock of ACF and the balance by cash. By due resolution and recordation ERCO was dissolved after the distribution to the stockholders of the cash and securities received from ACF, less a small amount retained to pay claims, upon the surrender and cancellation of their stock in ERCO. In other words, it was a complete liquidation. *United States Trust Co.* v. *Commissioner of Corporations and Taxation,* 229 Mass. 296, 13 N.E. 2d 6, Cert. den. 305 U.S. 659, 83 L. Ed. 427, 59 S. Ct. 359.

The $3,000,000 in cash and securities which ERCO received and distributed to its stockholders represented $190,000 of preferred and capital stock, and the balance of $2,810,000, earnings and surplus, of which $613,628.54 was net business or operating profits up to and including November 15, 1954, the day before the transfer to ACF. The remaining surplus represented increment in value of the business and assets over the several years prior to the sale. There can be no doubt that all of such items, with the exception of the $190,000 capital item, were surplus.

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[2] Supplement IV, District of Columbia Code.

Edwards v. *Douglas,* 269 U.S. 204, 70 L. Ed. 235, 46 S. Ct. 85; *Randall* v. *Bailey,* 288 N.Y. 280, 43 N.E. 2d 43, 48; *Commissioner of Corporations and Taxation* v. *Filoon,* 310 Mass. 374, 38 N.E. 2d 693, 700. They were earnings and profits,—even those items which were not taxable income under the Maryland, District of Columbia or Federal income tax laws. *Mertens, Law of Federal Income Taxation,* Section 9.37, page 472, Vol. 1 and Section 40.15, page 371, Vol. 7; *W. F. Farish & Co.,* 38 B.T.A., 150, aff'd. 104 F. 2d 833. *Susan T. Freshman,* 33 B.T.A., 394, appeals dismissed, C.C.A. 2d Nov. 17 and 27, 1936; *Dorothy Whitney*
155 *Elmhirst,* 41 B.T.A., 348; *Commisisoner* v. *F. J. Young Corporation,* 103 F. 2d 137.

In the definition of the term "dividend" Congress clearly intended that all distributions upon the liquidation of a corporation, except those representing the capital stock and "paid-in surplus", should be taxable income. No language could be plainer. All doubt, controversy or economic theories as to the meaning of "dividend" and distinction between it and liquidating distributions are unimportant and out of place in the light of the language: "The word 'dividend' means any distribution made by a corporation to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), * * * *and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation* * * *". In the face of such language the Court must hold that the petitioners' first contention, that is to say, its claim that a liquidating distribution is not a dividend is without merit. The cases cited by the petitioners on that point, with the exception of one, relate to provisions of the Federal income tax law differing from the District law, and none is helpful in disposing of that point. They should perhaps be discussed because of some light they might throw upon the petitioners' second position.

Goodrich v. *Edwards,* 255 U.S. 527, 65 L. Ed. 758, 41 S. Ct. 390. All that was decided was (a) that increment in value accruing after March 1, 1913 was taxable and (b) in the event of increase over the value as of March 1, 1913, no taxable income was received if the price received for the assets sold was less than the price paid upon a purchase prior to March 1, 1913.

Walsh v. *Brewster,* 255 U.S. 536, 65 L. Ed. 762, 41 S. Ct. 392, held substantially the same as *Goodrich* v. *Edwards* in the early portion of the decision. In the latter portion it merely affirmed a lower court's decision which followed the famous case *Eisner* v. *Macomber,* 252 U.S. 189,
156 64 L. Ed. 521, 40 S. Ct. 189, in holding that a stock dividend of the *"Eisner* v. *Macomber"* type was not income.

Hellmich v. *Hellman,* 276 U.S. 233, 72 L. Ed. 544, 48 S. Ct. 244. While the Supreme Court held that amounts distributed in liquidation of a corporation shall be treated as payments in an exchange of stock it must be observed that Section 201(a) of the Revenue Act of 1918, there applicable, defined the term "dividend", as does the District law, as "any distribution made by a corporation * * * to its shareholders * * * whether in cash or in other property", but that the Act, unlike the District law, contained Section 201(c) which provided that *"amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares";* and that the decision was based upon Treasury Regulation 45 which conformed to Sections 201(a) and 201(c) and provided, among other things, that "A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus * * *."

Canal Commercial Trust and Savings Bank v. *Commissioner*, 63 F. 2d 619. Same as the *Hellman* case, which it followed.

Lynch v. *Turrish*, 247 U.S. 221, 62 L. Ed. 1087, 38 S. Ct. 537, arose under the Act of October 3, 1913, which did not provide as did the Revenue Act of 1918, that amounts received in liquidation should be considered as received in exchange of stock. It is true that the Supreme Court held, as the petitioners here contend, that the amounts received in liquidation were not taxable income under the Act, but what the petitioners apparently overlook is that the amount received represented increase in assets prior to March 1, 1913, "due to the gradual rise in the
157 market value of the lands" prior to that date. That was all that was decided. This is clear from a study of the decision. There is first set out the decisions of the district and circuit court in favor of the taxpayers in this language:

> "The district court and the circuit court of appeals decided that the amount so distributed to Turrish was not income within the meaning of the statute, basing the decision on two propositions, as expressed in the opinion of the circuit court of appeals, by Sanborn, Circuit Judge: (a) The amount was the realization of an investment made some years before, representing its gradual increase during those years, and which reached its height before the effective date of the law, that is, before March 1, 1913, and the mere change of form of the property 'as from real to personal property, or from stock to cash', was not income to its holders because of the value of the property was the same after as before the change; (b) the timberlands were the property, capital, and capital assets of their legal and equitable owner, and the enhancement of their value during a series of years 'prior to the effective date of an income tax law, although divided or distributed by dividend or otherwise subsequent to that date, does not become income, gains, or profits taxable under such act.' "

After discussion of authorities, Mr. Justice McKenna continued:

> "* * *. If the increase in value of the lands was income, it had its particular time, and such time must have been within the time of the law to be subject to the law; that is, it must have been after March 1, 1913. But, according to the fact admitted, there was no increase after that date, and therefore no increase subject to the law. There was continuity of value, not gain or increase. In the first proposition of the court of appeals we concur.
>
> * * * * *
>
> "We concur, therefore, in the second proposition of the Circuit Court of Appeals as well as in the first, and affirm the judgment."

Lynch v. *Hornby,* 247 U.S. 339, 62 L. Ed. 1149, 38 S. Ct. 543, held that dividends paid to stockholders by a going concern was taxable income, although paid from surplus accumulated prior to March 1, 1913, coupled with *Lynch* v. *Turrish, supra,* it does draw a distinction between a dividend paid by a going concern and one made upon dissolution. The law there being considered had no definition of "dividend", which was quite unlike the District of Columbia law which includes liquidating distributions in the definition of the term "dividend".

158 *Langstaff* v. *Lucas,* 9 F. 2d 691, follows *Hellmich* v. *Hellman, supra,* in that it involves a distribution in complete liquidation under Sections 201(a) and 201(c) of the Revenue Act of 1918.

Lynch v. *State Board of Assessment and Review,* 228 Iowa 1000, 291 N.W. 161, was a case of complete liquidation. Taxpayer owned stock in Lynch Transfer Company. Surplus prior to effective date of Iowa Income Tax Law, January 1, 1934, was $11,058.54, and at dissolution in December, 1936 was $21,085.51. The definition of "gross income" in the Iowa law as the same as the District's,

but the definition of "dividend" was "any distribution made by a corporation out of *its earnings or profits* to its stockholders or members, whether in cash or in other property of the corporation", which does not specifically include liquidating distributions, as does the District of Columbia law. Article 37 of the Iowa regulations provided that a liquidating dividend was return of a capital investment and constituted a sale or exchange of the capital stock. The Supreme Court of Iowa (page 163 of 291 N.W.) held:

> "There is a distinction between dissolution or liquidating dividend and ordinary dividends. In the case of liquidating dividends the stockholder receives a return of his own property, while in an ordinary dividend it is the profit or income that is distributed to him."

Manifestly the Iowa case is of no help or application here.

The Revenue Act of 1916 defined the term "dividend". While not as clear or positive as to the inclusion of liquidating distributions in the term "dividend", such distributions were held to be dividends and taxable as such. The same was true as to the Revenue Act of 1917. The Revenue Act of 1918, however, in effect provided that amounts received as liquidating distributions were payments in exchange for stock. Later Revenue Acts have provided substantially the same. Under the 1917 Revenue Act there arose *James Dobson,* 1 B.T.A., 1082. The U. S. Tax Court, then the Board of Tax Appeals, believed,
159 as this Court believes, that Congress meant what it plainly said. There seems pertinent at this point the excerpt from the *Dobson* case following:

> "The Commissioner contends that the provisions of section 31(b) of the Revenue Act of 1916 have no application to payments made in final liquidation, but only to dividends paid by a corporation continuing in business, that distributions in liquidation should be treated as constituting payment in exchange for stock,

as provided in section 201(c) of the Revenue Act of 1918, and that the taxpayer, having recovered the full cost of his shares, and more, in 1917, should have his 1918 receipts treated as taxable profit.

"The history of the provisions of the various Revenue Acts with respect to dividends and corporate distributions is of assistance to us in considering this issue. The Revenue Act of 1913, section B, defined net income as including 'dividends,' but it contained no definition of dividends and made no provision with respect to the assets out of which distributions by corporations should be deemed to have been made.

"Considerable doubt arose as to the taxability of distributions of surplus accumulated prior to the adoption of the Sixteenth Amendment, both when made as ordinary dividends and when made as part of a general liquidation. The United States District Court, in January, 1916, and the Circuit Court of Appeals for the Eighth Circuit, on September 4, 1916, decided that such distributions, whether as ordinary dividends or in liquidation, were not taxable to the recipient stockholders. *Lynch* v. *Hornby,* 236 Fed. 661; *Lynch* v. *Turrish,* 236 Fed. 653. Before these cases reached the Supreme Court, the Revenue Acts of 1916 and 1917 had been passed and definitions of 'dividends' were included in them. The Supreme Court in *Lynch* v. *Hornby,* 247 U.S. 339, expressed the view that the new provisions were not intended to be declaratory of the intent of the 1913 Act, but rather constituted a concession to the equity of stockholders.

"Section 2(a) of the 1916 Act defined net income as including dividends, but contained this proviso:

" '*Provided,* That the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint-stock company, association, or insurance company, out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of its cash value.'

"In the Revenue Act of 1917, section 2(a) of the 1916 Act was amended by being repeated without the proviso, while the proviso was inserted as a new section 31(a), and to it was added a new subsection (b), as follows:

"'(b) Any distribution made to the shareholders or members of a corporation, joint-stock company, or association, or insurance compnay, in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or surplus, and shall constitute a part of the annual income of the
160 distributee for the year in which received, and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits or surplus were accumulated by the corporation, joint-stock company, association, or insurance company, but nothing herein shall be construed as taxing any earnings or profits accrued prior to March first, nineteen hundred and thirteen, but such earnings or profits may be distributed in stock dividends or otherwise, exempt from the tax, after the distribution of earnings and profits accrued since March first, nineteen hundred and thirteen, has been made. This subdivision shall not apply to any distribution made prior to August sixth, nineteen hundred and seventeen, out of earnings or profits accrued prior to March first, nineteen hundred and thirteen.'

"Subsequently, the Supreme Court, on June 3, 1918, affirmed *Lynch* v. *Turrish*, 247 U.S. 221, and reversed *Lynch* v. *Hornby*, 247 U.S. 339. Then, in the Revenue Act of 1918, approved February 24, 1919, Congress dropped those provisions of section 31(b), *supra*, which taxed dividends at the rates in effect for the years in which the distributed profits had been earned, and added the provision of section 201(c), as follows:

"'(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any

gain or profit realized thereby shall be taxed to the distributee as other gains or profits.'

"In the circumstances, it would seem that Congress, when it passed the Act of 1916 and 1917, intended to treat ordinary dividends and distributions in liquidation alike, as they had been treated by the District Court and the Circuit Court of Appeals, but in the 1918 Act decided to make a distinction between them as the Supreme Court had done in interpreting the 1913 Act. This being the case, we can hardly regard the provisions of section 201(c) of the Act of 1918 as declaratory of the intent of the 1917 Act.

"The 1917 Act, treating ordinary dividends and distributions in liquidation alike, provided that '*any distribution* * * *' shall be deemed to have been made from the most recently accumulated undivided profits or surplus.' And in 'any distribution' must be included distributions made in liquidation as well as those made in ordinary course of business. The term *distribution,* in its commonly accepted meaning, certainly includes payments made to stockholders in liquidating a corporation. The Supreme Court so used it in its opinion in *Lynch* v. *Turrish, supra.*"

See also *Edwards* v. *Douglas, supra.*

In respect of the second point raised by the petitioners the Court can see nothing unconstitutional in taxing earnings, profits and surplus distributed in the liquidation or dissolution of a corporation and exemption of gains from the sale or exchange of assets held for more than
161 two years. Certainly, the difference in treatment in the two instances cannot be said to be unreasonable or productive of unjust results. The Federal and many local income tax laws including that of the District of Columbia have had or have like distinctions and differences. As a matter of fact the petitioners here insist upon a ruling that would result in greater discrimination than that of which they complain and seek to avoid, that is to say, that if earnings, profits and surplus is distrib-

uted by a going concern the distribution should be taxable, but if distributed in liquidation or dissolution it should be exempt. It is hardly necessary to cite authority for the principle in the law of taxation that the state legislatures can without violating the Fourteenth Amendment, and Congress, without violating the Fifth Amendment, select such transactions, property, income and the like for taxation and exempt others, so long as those in the same class are treated alike and there is no unjust or unreasonable discrimination. It might, however, be appropriate to cite the following: *Bells Gap R. Co.* v. *Pa.*, 134 U.S. 533, 33 L. Ed. 892, 10 S. Ct. 533; *Nicol* v. *Ames*, 173 U.S. 509, 520, 521, 43 L. Ed. 786, 793, 794, 19 S. Ct. 522; *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 158, 55 L. Ed. 389, 416, 31 S. Ct. 342; *Trefry* v. *Putnam*, 227 Mass. 522, 116 N.E. 904, 909; *Cooley, Taxation*, Section 249, page 530, Volume 1, 4th Edition. Two cases of interest and importance in the disposition of the petitioners' second point (of unconstitutionality) are *Colgate* v. *Harvey*, 296 U.S. 404, 80 L. Ed. 299, 56 S. Ct. 252, and *Madden* v. *Kentucky*, 309 U.S. 83, 84 L. Ed. 590, 60 S. Ct. 406. In the *Colgate* case the difference in tax treatment by Vermont of dividends earned within and without the State, and different exemptions for earned and unearned income were approved by the Supreme Court. The Supreme Court did hold, however, that exemption of interest from loans made in the State not exceeding 5 per centum, while interest from other loans were taxed and unconstitutional, since it deprived persons of privileges and immunities and
162 equal protection of the law. This last mentioned ruling, however, was specifically overruled five years later in the *Madden* case. There Mr. Justice Reed, speaking for the Supreme Court stated the rule to be as follows:

> "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded

> that 'The Fourteenth Amendment was not intended to compel the State of to adopt an iron rule or equal taxation', and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxatime, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of the legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking every legislative arrangement to negative every conceivable basis which might support it.''

The third contention of the petitioners, namely, that this Court should not literally construe the language of Section 47-1551c(m) of the Code which plainly provides that distribtuions of earnings, profits and surplus in liquidation or dissolution of a corporation shall be considered ''dividends'', because, they say, such ruling would lead to absurd results and that Congress did not intend to make distributions in liquidation or dissolution dividends and therefore taxable. They do not claim, as was held in most, if not all of the cases on which they rely, that the literal meaning has no application to their *particular* situation, but that *in every instance* it should be held, contrary to the plain langauge of the section, that the term ''dividend'' does not include distributions of earnings, profits and surplus ''whether distributed prior to, during, upon or after liquidation or dissolution of the corporation''.

163 The Court cannot agree with the foregoing contention of the petitioners. There is nothing absurd or even unreasonable in the provision making distribu-

tions in liquidation or dissolution dividends and taxable as such. It was so provided in two, if not other Revenue Acts, and in the laws of several of the States. The decisions of the Court of Appeals of Kentucky are helpful not only because Kentucky is regarded as a highly advanced taxing jurisdiction, but also because, while the intention of the Kentucky legislature that distributions in liquidations be taxable income is not as clear as that of Congress in the District of Columbia law, the taxing statutes of the two jurisdictions are similar. Section KRS 141.010(3) of the Kentucky law contains this definition:

> "'Dividend' means any distribution made by a corporation out of its current earnings or profits or out of its accumulated earnings or profits, to its stockholders or members, whether the distribution is made in cash or other property. It includes such portion of the assets of a corporation distributed at the time of dissolution as is in effect a distribution of earnings or profits, provided the distribution constitutes income to its recipients * * *. In a distribution at the time of dissolution all money or other property received that is not in effect a distribution of earnings of the corporation[3] shall be treated under Subsection (1) KRS 141.100 * * *."

Section KRS 141.100(2), which is in substance identical with Section 47-1551c(1) of the District of Columbia Code, which defines "capital assets" as property held more than two years, and Section 47-1557b(11), provides that gain from the sale or exchange of capital assets shall not be included in gross income. The Kentucky law (KRS 141.100(2) reads:

> "(2) Income realized and loss sustained from the sale of property held two years or more shall be ignored in computing income for the purposes of this chapter. * * *."

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[3] The same result in the District of Columbia is obtained by not including capital stock paid-in surplus in the term "dividend".

The Kentucky law, like the District statute, further pro-

164 The Kentucky law, like the District statute, further provides that gross income shall include dividends, and requires payment of an income tax on net income.

Three cases that arose under the Kentucky law are important in answer to the petitioners' contentions. The first, *Reeves* v. *Turner,* 289 Ky. 426, 158 S.W. 2d 978, which involved a distribution of *cash* in the liquidation of a corporation, that is to say, the corporation, like ERCO, sold its asssets before dissolution. The cash distributed was held to be taxable income, the Court of Appeals saying:

> "Nor can the power of the Legislature be denied to define that accumulated profits, when distributed in the way of a liquidating dividend shall be income when received by a stockholder. * * *. The taxable event is the receipt by the stockholder of the liquidating dividend even though some of it represented enhanced value to the corporation before the adoption of the income tax act."

The next two cases *Collins* v. *Ky. Tax. Com.,* Ky., , 261 S.W. 2d 303, and *Cummins* v. *Reeves,* Ky. , 261 S.W. 2d 307, arose out of the dissolution and liquidations of Cummins Distilleries. Unlike the *Reeves* v. *Turner, supra,* the two cases involved a liquidating distribution of the corporation's *property in kind.*[4] The Court of Appeals in both followed *Reeves* v. *Turner,* and held that the property received was a dividend and taxable as income. Pertinent to the issues here raised is the excerpt from the opinion in the *Collins* case following:

> "In the final analysis decision in the case must turn on the wording of the statute. The key phrase, to our minds, is: 'It (dividend) includes such portion

[4] The property was warehouse receipts representing whiskey in storage, which had greatly increased in value while in storage, without reflection of such increase on the books of the corporation.

of the assets of a corporation distributed at the time of dissolution as is in effect a distribution of earnings or profits.' It must be assumed this phrase was included in the statute for a purpose and we are not at liberty to ignore it. Furthermore, we think the words should be given their plain, ordinary, and commonly understood meaning. When this is done we are forced to the conclusion these words were included in the statute with calculated forethought to include just such a contingency as now confronts us. If the transaction in question was not 'in effect a distribution of earnings or profits,' we can hardly conceive
165 of a case where this phrase would be applicable. It seems to us the defect in the taxpayer's reasoning lies in the failure to account satisfactorily for the source of the profit admittedly realized. This profit did not result from legerdemain or sleight of hand. It has a definite economic source. As we see it, that source has to be either the earnings or profits of the corporation, or the increase in value of the whiskey warehouse receipts during the few days they were held by the stockholders. If either of these alternatives is correct, the gain to the taxpayer is taxable income. It cannot be said with any degree of logic that the holding of the whiskey by the corporation for more than two years was in legal effect a holding by the individual stockholders. The stockholders did not hold the whiskey as such. They held the stock certificates which entitled them, among other things, to a certain percentage of the earnings and profits of the corporation. But the holding of the stock was not legally equivalent to a holding of the whiskey. It may be conceded that so long as the whiskey was held by the corporation, with no markup on its books, the increased value of the whiskey was not taxable as earnings or profits of the corporation. But when the corporation, instead of making a bookkeeping entry on its own books prior to dissolution, thereby showing a profit payable as a liquidating dividend, transferred this increased value, or gain, to its stockholders, it was 'in effect a distribution of earnings or profits' of the corporation within the contemplation of the statute."

See also: *Harrison* v. *District of Columbia,* D.C.B.T.A., Docket No. 965.

The Court is of the opinion that under the plain language and intent the above quoted Sections of the District of Columbia Income and Franchise Tax Act of 1947 the cash and securities received by the petitioners, with the exception of the amount representing capital stock, upon the liquidation or dissolution of ERCO were dividends and taxable income; that there is nothing unconstitutional in the provision that a distribution of earnings, profits, or surplus in the liquidation or dissolution of a corporation is a dividend and is taxable as income, even in the face of the section of the Act exempting the gain from the sale or exchange of assets held for more than two years; and that there is no occasion to ignore the plain language and intent of Congress to make the distribution of earnings, profits and surplus in liquidation taxable income, that is to say, the same as the distribution of same by a going concern. This is not a case for the application of the rule laid down in *Manoukian et al.* v. *Tomasian,* —— U.S. App. D.C. ——, 237 F. 2d 211, 85 W.L.R. 73.

166

For the reasons stated the Court holds that the income taxes and interest assessed against the petitioners and herein involved were validly assessed and are hereby affirmed.

Decisions will be entered for the respondent.

Jo. Morgan
Jo. V. Morgan,
Judge.

167 Filed May 15, 1957

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1555

HENRY A. BERLINER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Decision

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is by the Court, this 15th day of May, 1957

ADJUDGED AND DETERMINED, that an income tax for the calender year 1954, assessed against the petitioner in the amount og $51,183.30, together with interest in the amount of $3,881.23, or a total of $55,064.53 was validly assessed against the petitioner and is hereby affirmed; and that the petitioner is not entitled to any refund thereof.

Jo V. MORGAN
Jo. V. Morgan,
Judge.

* * * * * * * * * *

172 DISTRICT OF COLUMBIA TAX COURT

Docket No. 1556

JOSEPHINE M. BERLINER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Counsel: BERNARD I. NORDLINGER, ESQ.
Address: 419 Southern Building,
Washington 5, D. C.

Docket

1956

Date	Proceedings	Memorandum
9/12	Petition filed. Taxpayer, Counsel for Respondent and Assessor served.	Income tax $ 933.11 753.23 Int. $10,686.34

10/8—Hearing set for Oct. 30. Attorney for Petitioner, Corporation Counsel and Assessor served.
10/16—Motion for continuance—Granted to Dec. 4.
Motion to Consolidate proceedings—Granted
Copies of Motions served on Attorney for Petitioner; Corporation Counsel and Assessor.
Dec. 3—Stipulation with attached exhibits numbered "1" to "10".
Dec. 4—Hearing—Henry E. Wixon for respondent.

1957

Feb. 11—Brief filed by petitioner—Certificate of Service.
Mar. 13—Respondent's motion for extension of time for filing brief—Granted Certificate of Service.
Apr. 12—Brief for respondent—Certificate of Service.
May 7—Reply brief for petitioner—Certificate of Service.
May 15—Findings of Fact, Opinion and Decision—Asses-

sor, Corporation Counsel and Attorney for Petitioners served.

June 10—Petition for Review filed by petitioners—Certificate of Service.

June 13—Designation of Record—Certificate of Service.

July 18—Order for Delivery of Original Exhibits—Copies served Attorneys.

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176 Filed May 15, 1957

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1556

JOSEPHINE M. BERLINER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Decision

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is by the Court, this 15th day of May, 1957

ADJUDGED AND DETERMINED, that an income tax for the calender year 1954, assessed against the petitioner in the amount of $9,933.11, together with interest in the amount of $753.23, or a total of $10,686.34 was validly assessed against the petitioner and is hereby affirmed; and that the petitioner is not entitled to any refund thereof.

Jo V. MORGAN
Jo. V. Morgan,
Judge.

* * * * * * * * * *

178 DISTRICT OF COLUMBIA TAX COURT

Docket No. 1557

ROBERT B. FRANK, Trustee for CORA A. BERLINER CUNNINGHAM, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Counsel: BERNARD I. NORDLINGER, ESQ.
Address: 419 Southern Building,
Washington 5, D. C.

Docket

1956

Date	Proceedings	Memorandum
9/12	Petition filed. Taxpayer, Counsel for Respondent and Assessor served.	Income tax $10,082.66 764.57 Int. $10,847.23
10/8	Hearing set for Oct. 30. Attorney for petitioner, Corporation Counsel and Assessor served.	
10/16	Motion for substitution of petitioner—Granted. Motion for continuance of hearing—Granted to Dec. 4. Copies served Attorney for Petitioner, Corporation Counsel and Assessor.	
Dec. 3	Stipulation with attached exhibits numbered "1" to "10".	
Dec. 4	Hearing—Henry E. Wixon for respondent.	

1957

Feb. 11	Brief filed by petitioner—Certificate of Service.
Mar. 13	Respondent's motion for extension of time for filing brief—Granted Certificate of Service.
Apr. 12	Brief for respondent—Certificate of Service.
May 7	Reply brief for petitioner—Certificate of Service.

May 15—Findings of Fact, Opinion and Decision—Assessor, Corporation Counsel and Attorney for Petitioners served.
June 10—Petition for Review filed by petitioners—Certificate of Service.
June 13—Designation of Record—Certificate of Service.
July 18—Order for Delivery of Original Exhibits. Copies served Attorneys.

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185 Filed May 15, 1957

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1557

ROBERT B. FRANK, Trustee for CORA A. BERLINER CUNNINGHAM, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Decision

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is by the Court, this 15th day of May, 1957

ADJUDGED AND DETERMINED, that an income tax for the calender year 1954, assessed against the petitioner in the amount of $10,082.66, together with interest in the amount of $764.57, or atotal of $10,847.23 was validly assessed against the petitioner and is hereby affirmed; and that the petitioner is not entitled to any refund thereof.

Jo V. MORGAN
Jo. V. Morgan,
Judge.

* * * * * * * * * *

187 DISTRICT OF COLUMBIA TAX COURT

Docket No. 1558

ROBERT B. FRANK, Trustee for JOSEPHINE L. BERLINER VARGAS, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Counsel: BERNARD I. NORDLINGER, ESQ.
Address: 419 Southern Building,
Washington 5, D. C.

Docket

1956

Date	Proceedings	Memorandum
9/12	Petition filed, Taxpayer, Assessor and CC. Served	Income tax $10,082.66 764.57 Int. $10,847.23
10/8	Hearing set for Oct. 30. Attorney for Petitioner, Corporation Counsel and Assessor served.	
10/16	Motion for substitution of petitioner—Granted. Motion for continuance of hearing—Granted to Dec. 4. Copies served Attorney for Petitioner, Corporation Counsel and Assessor.	
Dec. 3	Stipulation with attached exhibits numbered "1" to "10".	
Dec. 4	Hearing—Henry E. Wixon for respondent.	

1957

Feb. 11—Brief filed by petitioner—Certificate of Service.
Mar. 13—Respondent's motion for extension of time for filing brief—Granted—Certificate of Service.
Apr. 12—Brief for respondent—Certificate of Service.
May 7—Reply brief for petitioner—Certificate of Service.

May 15—Findings of Fact, Opinion and Decision—Assessor, Corporation Counsel and Attorney for Petitioners served.
June 10—Petition for Review filed by petitioners—Certificate of Service.
June 13—Designation of Record—Certificate of Service.
July 18—Order for Delivery of Original Exhibits. Copies served Attorneys.

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194 Filed May 15, 1957

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1558

ROBERT B. FRANK, Trustee for JOSEPHINE L. BERLINER VARGAS, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Decision

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is by the Court, this 15th day of May, 1957

ADJUDGED AND DETERMINED, that an income tax for the calender year 1954, assessed against the petitioner in the amount of $10,082.66, together with interest in the amount of $764.57, or a total of $10,847.23 was validly assessed against the petitioner and is hereby affirmed; and that the petitioner is not entitled to any refund thereof.

Jo V. MORGAN
Jo. V. Morgan,
Judge.

• • • • • • • • • •

196 DISTRICT OF COLUMBIA TAX COURT

Docket No. 1559

ROBERT B. FRANK, Trustee for HENRY A. BERLINER, JR., *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Counsel: BERNARD I. NORDLINGER, ESQ.
Address: 419 Southern Building,
Washington 5, D. C.

Docket

1956

Date	Proceedings	Memorandum
9/12—Petition filed. and CC served	Taxpayer, Assessor	Income tax $10,082.66 764.57 Int. $10,847.23

10/8—Hearing set for Oct. 30. Attorney for Petitioner, Corporation Counsel and Assessor served.

10/16—Motion for substitution of petitioner—Granted. Motion for continuance of hearing—Granted to Dec. 4. Copies served Attorney for Petitioner, Corporation Counsel and Assessor.

Dec. 3—Stipulation with attached exhibits numbered "1" to "10".

Dec. 4—Hearing—Henry E. Wixon for respondent.

1957

Feb. 11—Brief filed by petitioner—Certificate of Service.

Mar. 13—Respondent's motion for extension of time for filing brief—Granted—Certificate of Service.

Apr. 12—Brief for respondent—Certificate of Service.

May 7—Reply brief for petitioner—Certificate of Service.

May 15—Findings of Fact, Opinion and Decision—Assessor, Corporation Counsel and Attorney for Petitioners served.
June 10—Petition for Review filed by petitioners—Certificate of Service.
June 13—Designation of Record—Certificate of Service.
July 18—Order for Delivery of Original Exhibits. Copies served Attorneys.

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203 Filed May 15, 1957

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1559

ROBERT B. FRANK, Trustee for HENRY A. BERLINER, JR., *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Decision

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is by the Court, this 15th day of May, 1957

ADJUDGED AND DETERMINED, that an income tax for the calender year 1954, assessed against the petitioner in the amount of $10,082.66, together with interest in the amount of $764.57, or a total of $10,847.23 was validly assessed against the petitioner and is hereby affirmed; and that the petitioner is not entitled to any refund thereof.

JO V. MORGAN
Jo. V. Morgan,
Judge.

* * * * * * * * * *

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MAY 26 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1025

HENRY A. BERLINER, JOSEPHINE M. BERLINER, ROBERT B. FRANK as Trustee for CORA ANNE B. CUNNINGHAM, JOSEPHINE L. B. VARGAS and HENRY A. BERLINER JR.,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MILTON W. KING
BERNARD I. NORDLINGER
WALLACE LUCHS, JR.
ROBERT B. FRANK
419 Southern Building
Washington 5, D. C.
Attorneys for Petitioners

Of Counsel
KING & NORDLINGER

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I. The Court of Appeals extended the holding of *Neild* v. *District of Columbia* to state that the benefit of the Fifth Amendment is probably not relevant for the purpose of protecting citizens of the District of Columbia, as distinguished from the citizens of the several States, from District of Columbia Income Taxes which impose (a) conclusive presumptions contrary to fact; (b) taxes without regard to the gain or loss realized by the taxpayer; and (c) arbitrary and unreasonable classification among taxpayers 8

II. It is an arbitrary and capricious exercise of the taxing power in violation of the Fifth Amendment to tax petitioners for receipt of a dividend when petitioners in truth exchanged their stock with their corporation upon liquidation 10

III. When the Revenue Laws of the District of Columbia, are construed to levy a tax upon petitioners, the measure of the tax is the earnings or surplus of the corporation in liquidation or dissolution and not the income or gain derived by petitioners; hence the asserted tax purports to measure the tax on petitioners' income by referring to the income of the corporation, a system in violation of the Fifth Amendment 11

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

HENRY A. BERLINER, JOSEPHINE M. BERLINER, ROBERT B. FRANK as Trustee for CORA ANNE B. CUNNINGHAM, JOSEPHINE L. B. VARGAS and HENRY A. BERLINER JR.,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to reverse the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled consolidated causes No. 14024 through 14028, inclusive, on May 1, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the District of Columbia Tax Court in the above-entitled consolidated causes is unreported

and appears at J. A. 21-44. The opinion of the Circuit Court of Appeals is as yet unreported and appears attached hereto as "Appendix A."

JURISDICTION

The judgment of the Court of Appeals in the above-entitled consolidated causes was entered on May 1, 1958 (R. 72). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1), 62 Stat. 928 and D. C. Code, § 47-2404(a) Supp. VI (1957), Act of July 10, 1952, 66 Stat. 544, ch. 649 § 3(b).

QUESTION PRESENTED

Whether the due process clause of the Fifth Amendment of the Constitution protects the citizens of the District of Columbia (as it does the citizens of the several States) from imposition of income taxes (a) under presumptions contrary to fact, or (b) without regard to the gain or loss realized by a taxpayer, or (c) under arbitrary classifications among taxpayers, and if so, whether sums in excess of par or stated value of stock received by a stockholder upon the liquidation or dissolution of a corporation, should be considered as received from a disposition of "capital assets" or as from "dividends" under the District of Columbia Revenue Laws.

STATUTES INVOLVED

The statutory provisions upon which the District of Columbia income tax was levied, appear in Title 47, §§ 1557, 1557a, 1551c, and 1595 of the District of Columbia Code (1951 Ed.), and the applicable parts thereof are printed and attached hereto as "Appendix B."

STATEMENT

Petitioners Henry A. Berliner and Josephine M. Berliner are husband and wife. Cora A. B. Cunningham, Josephine L. B. Vargas and Henry A. Berliner, Jr. are, respectively, the married daughters and unmarried son of Mr. and Mrs. Berliner. (J. A. 5.). Robert B. Frank is a successor Trustee for the aforementioned children of Mr. and Mrs. Berliner and is entitled to the same relief, if any, as his predecessor Trustee (J. A. 6, 7). All the foregoing persons are residents of the District of Columbia, except Mrs. Vargas who is a resident of Reno, Nevada (J. A. 21).

On January 2, 1937, Mr. and Mrs. Berliner, and for the purposes of this petition, Robert B. Frank, Trustee for the three children of Mr. and Mrs. Berliner, acquired the following number of shares of common stock of the Engineering and Research Corporation (hereinafter termed "ERCO"), a Maryland corporation, full paid and non-assessable, at a cost of One Hundred Dollars ($100) per share, and each of said parties continuously from that date thenceforward owned said shares of stock of said corporation until December 9, 1954, as follows (J. A. 5, 6, 10):

SCHEDULE 1

	No. of Shares
Henry A. Berliner	50
Josephine M. Berliner	10
Robert B. Frank, Trustee for Cora A. B. Cunningham	10
Robert B. Frank, Trustee for Josephine L. B. Vargas	10
Robert B. Frank, Trustee for Henry A. Berliner, Jr.	10

On November 15, 1954, ERCO, which carried on its business activities in the State of Maryland, sold its business to ACF Industries, Incorporated, a New Jersey corporation (hereinafter called "ACF"). Following said date, ERCO transacted and conducted no business whatsoever, and carried on no activities of any kind, save and except incident to its liquidation and dissolution which it commenced on November 26, 1954, and concluded on December 27, 1954 (J. A. 7, 25). On December 9 and 21, 1954, ERCO duly distributed its assets to its stockholders and each received his pro rata share of the assets of ERCO, consisting substantially of cash, as follows (J. A. 8, 9, 24):

SCHEDULE 2

	Total Received
Henry A. Berliner	$1,284,582.50
Josephine M. Berliner	256,916.50
Robert B. Frank, Trustee for Cora A. B. Cunningham	256,916.50
Robert B. Frank, Trustee for Josephine L. B. Vargas	256,916.50
Robert B. Frank, Trustee for Henry A. Berliner, Jr.	256,916.50
	$2,312,248.50

Henry A. Berliner had paid Five Thousand Dollars ($5,000) for his stock and each of the other four stockholders had paid One Thousand Dollars ($1,000) (J. A. 5, 6, 10). The foregoing distribution consisted of $9,000.00 capital and the remainder was paid out of the surplus of ERCO theretofore acquired by ERCO from (1) its operations commencing January 2, 1937, and terminating December 9, 1954, and (2) the proceeds of sale of its business to ACF under the contract of sale of November 8, 1954 (J. A. 19, 24).

When ERCO distributed its assets to its stockholders, the Assessor for the District of Columbia included in the income of each of them the pro rata share of each of them in the surplus of ERCO reflected on its books (J. A. 19, 24) without distinction as to the surplus which had been earned by ERCO from its operations to the date of sale, $613,628.54, and the surplus arising from the sale of the business. The surplus arising from the sale of the business represented increment in value of the assets over the years prior to the sale (J. A. 26, 30).

Income taxes were assessed against petitioners as follows (J. A. 27):

	Income Tax	Interest
Henry A. Berliner	$51,883.30	3,881.23
Josephine M. Berliner	9,933.11	753.23
Robert B. Frank, Trustee for Cora A. B. Cunningham	10,082.66	764.57
Robert B. Frank, Trustee for Josephine L. B. Vargas	10,082.66	764.57
Robert B. Frank, Trustee for Henry A. Berliner, Jr.	10,082.66	764.57

The foregoing income taxes and interest were paid by petitioners and petition for refund was duly filed by them in the District of Columbia Tax Court and denied. Petitioners' appeals followed to the United States Court of Appeals for the District of Columbia Circuit where the decision of the Tax Court was affirmed.

The assessment of the tax by the Assessor for the District of Columbia proceeded upon the theory that the District of Columbia Revenue Acts, § 47-1557a(a), defined gross income as including "dividends" and in turn, § 47-1551c(m) defined the word "dividend" to mean:

> ". . . any distribution made by a corporation . . . out of its earnings, profits or surplus . . . and whether distributed prior to, during, upon or after liquidation or dissolution of the corporation: *Provided, however,* that in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation *and not exempted from tax under this article,* the basis of the tax to the recipient thereof shall be the market value of such property at the time of such distribution . . ." (Italics added.)

Petitioners contended that the definition of gross income, § 47-1557a(a), excluded "income derived from . . . capital assets" which were defined as, § 47-1551c(l):

> ". . . any property . . . held by the taxpayer for more than two years."

Petitioners contended below that sums received by them as stockholders of ERCO in dissolution were not "dividends" within the customary and usual meaning of the term but were received as the result of a sale or exchange of stock in dissolution of their corporation. They further contended that if the definition of dividends contained in the District of Columbia Revenue Acts be presumed to create a conclusive presumption that sums obtained were dividends, when in truth and in fact those sums were not dividends, then the District of Columbia definition of dividends is in violation of the Fifth Amendment to the Constitution.

Petitioners further contended that the definition of dividends in the District of Columbia Revenue Acts purports to measure a tax on stockholders of a corporation, after the corporation liquidates and dissolves, not by the gain or loss realized by the stockholder but

by the amount of profit accumulated by the corporation. Thus, argued petitioners, the tax upon stockholders of a corporation is not measured by the income of the stockholders but by the income of the corporation, a third party. To attempt to levy an income tax upon the stockholders of a corporation, on the basis of the earnings of the corporation, rather than on the basis of the gain or loss realized by the stockholders, is to attempt to tax individuals because of the earnings of someone else, namely, the corporation, a taxing system heretofore held to be unconstitutional, in violation of the Fourteenth Amendment, the standards of which in a similar case have been held to be identical with the standards of the Fifth Amendment.

Furthermore, petitioners contended that when stockholders of a corporation, on liquidation and dissolution, receive their pro rata distribution of assets of the corporation, they transfer title to their shares of stock in exactly the same way that stockholders convey title to stock when they dispose of it by sale or exchange. The District of Columbia Revenue Acts exclude from gross income the proceeds of sale or exchange of stock which has been owned for more than two years. To exclude from tax, proceeds of sale or exchange, but to levy a tax upon receipt of proceeds of liquidation or dissolution of a corporation, when the incidents of the transaction are the same, and no possible reason exists for a distinction between the two transactions, petitioners claimed would constitute an arbitrary and unreasonable classification among taxpayers in violation of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Extended the Holding of Neild v. District of Columbia to State the Foregoing Considerations Probably Not Relevant for Purposes of the Fifth Amendment

Petitioners respectfully state that the due process clause of the Fifth Amendment affords protection to the citizens of the District of Columbia from the enforcement of Revenue laws which impose (a) conclusive presumptions contrary to fact; (b) taxes without regard to the gain or loss realized by the taxpayer; and (c) arbitrary and unreasonable classifications among taxpayers. The Fifth Amendment protects citizens of the several States and citizens of the District of Columbia should have the same protection. For the Court of Appeals to hold petitioners' contentions "probably not relevant for purposes of the Fifth Amendment" and to base that statement upon the decision in *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 F. 2d 246 (1940), is to graft upon the legal system of the District of Columbia exceptions from the benefit of the Fifth Amendment which should not be permitted to stand unchallenged. The question is of the gravest public importance to citizens of the District of Columbia and presents an important question of Federal law which should be settled by this Court. In *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585 (1937), this Court stated that it might assume that discrimination, in a Federal taxing statute "if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." This Court has heretofore stricken down distinctions based on arbitrary classifications. *Martin* v. *District of Columbia*, 205 U. S. 135 (1907); *Air-way Electric Appliance Corp.* v. *Day*, 266 U. S. 71 (1924);

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389 (1928); *Nichols* v. *Coolidge*, 274 U. S. 531 (1927); *Southern Railway Co.* v. *Greene*, 216 U. S. 400 (1910).

Actually, *Neild* v. *District of Columbia*, *supra*, expressly stated, 71 App. D. C. 306, 317:

> "In a sense it may be said that every citizen is entitled to the equal protection of the laws as they may be adopted and administered by the Federal Government throughout the land,"

citing *Truax* v. *Corrigan*, 257 U. S. 312, 332 (1921), in a footnote where it is said:

> "It [due process], of course, tends to secure equality of law in the sense that it makes a required *minimum of protection* for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law." (Italics in original.)

Thus, to say that citizens of the District of Columbia are probably not to be permitted to raise questions of the protection of the Fifth Amendment against arbitrary and unreasonable classification among taxpayers, or imposition of conclusive presumptions contrary to fact, or taxes measured by gains or losses realized by persons other than the taxpayer, is to permit an extension of the doctrine of *Neild* v. *District of Columbia*, *supra*, far beyond its reasonable or lawful implications.

Moreover, this Court has recognized that the due process clause of the Fifth Amendment covers much of the same ground as the equal protection clause of the Fourteenth. *Detroit Bank* v. *U. S.*, 317 U. S. 329

(1943); *Currin* v. *Wallace*, 306 U. S. 1, 13-14 (1939); *Steward Machine Co.* v. *Davis, supra.* In striking down under the Fifth Amendment the segregated school system of the District of Columbia which it had on the same day found to violate the equal protection clause of the Fourteenth Amendment, *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court observed that:

> "Classifications based solely on race must be scrutinized with particular care since they are contrary to our traditions and hence constitutionally suspect." *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

Any kind of artificial classification must therefore fall into the same category. To paraphrase the language of the Court in *Bolling* v. *Sharpe, supra*, it would be unthinkable that a Constitution which would forbid discrimination in a taxation by the States would sanction such discrimination in the District of Columbia.

Accordingly, it is forcefully maintained that, contrary to the language of the Court of Appeals, citizens of the District of Columbia are not excluded from the protection of the Fifth Amendment afforded the citizens of the several States, against arbitrary and unreasonable classifications among taxpayers and this Court should so hold.

II

It Is An Arbitrary and Capricious Exercise of the Taxing Power in Violation of the Fifth Amendment to Tax Petitioners for Receipt of a Dividend When Petitioners in Truth Exchanged Their Stock With Their Corporation Upon Liquidation

Under the Revenue Acts of the District of Columbia, § 47-1557a(b)(11), there is excluded from gross income "gains from the sale or exchange of any capital

asset" which in turn is defined, § 47-1551c(l) as "any property . . . held by the taxpayer for more than two years . . ." Thus, citizens of the District of Columbia may exclude from gross income proceeds of sale or exchange of stock held by them for more than two years. Yet, because of the definition of dividend contained in § 47-1551c(m) as construed by the Assessor, and supported by the Court of Appeals, holders of shares of stock who exchange their stock with their corporation when the latter liquidates, are taxed. Receipt of proceeds of liquidation from a corporation does not constitute receipt of a dividend. Compare *Lynch* v. *Turrish*, 247 U. S. 221 (1918) with *Lynch* v. *Hornby*, 247 U. S. 339 (1918). So to hold construes the statute to create an arbitrary conclusive presumption, contrary to fact. Arbitrary conclusive presumptions, contrary to fact, have been held to violate the tests of both the Fifth and Fourteenth Amendments to the Constitution. *Heiner* v. *Donnan*, 285 U. S. 312 (1932).

III

When the Revenue Laws of the District of Columbia, Are Construed to Levy a Tax Upon Petitioners, the Measure of the Tax Is the Earnings or Surplus of the Corporation in Liquidation or Dissolution and Not the Income or Gain Derived by Petitioners; Hence the Asserted Tax Purports to Measure the Tax on Petitioners' Income by Referring to the Income of the Corporation, a System in Violation of the Fifth Amendment to the Constitution of the United States

It is to be noted that ". . . any attempt to measure the tax on one person's property or income by reference to the property or income of another . . ." is unconstitutional under the standards of the Fourteenth Amendment to the Constitution of the United States. *Hooper* v. *Tax Commission*, 284 U. S. 206 (1931). As has been shown, the standards set up by the Fifth

Amendment (applicable to Federal action) and the Fourteenth Amendment (applicable to state action) are for this purpose identical. *Heiner* v. *Donnan, supra.*

In *Hoeper* v. *Tax Commission, supra*, an income tax was laid upon the income of the husband under a state statute which required to be included in the gross income of the husband, all earnings of the wife. Since the husband had not in fact realized income from his wife's earnings, the Court held the state tax to be unconstitutional. Thus, Congress, acting as a state legislature in exercising the power to tax residents of the District of Columbia, must conform to the same standard held by the Court to be required in *Hoeper, supra.*

Under the definition of the word "dividend" contained in the District of Columbia Revenue Acts, no recognition is accorded to the actual basis of the stock in the hands of the shareholder receiving distribution on liquidation. In cases (1) where loss is actually sustained by the shareholder, the Assessor would construe the statutory definition of dividend in a manner resulting in tax upon the shareholder, and (2) where gain is realized, the Assessor would assess no tax.

For example, *a loss which would be taxed as a dividend* A pays B $100,000 for one-half the stock of X Corporation, which owns net assets of $200,000 represented by capital of $100,000 and earned surplus of $100,000. *After several loss years*, X Corporation has net assets of only $150,000 and liquidates. A receives one-half of the then existing net assets, or $75,000, represented by $50,000 capital and $25,000 earned surplus, his pro rata portion of each. A has actually sustained a loss of $25,000; yet according to the Assessor,

would be taxable upon $25,000 (his pro rata share of earned surplus) as a dividend.

For an additional example, *a gain which would not be taxed as a dividend* A pays B $100,000 for one-half the stock of X Corporation, which owns net assets of $200,000, represented by capital of $400,000 less incurred deficits in operation of $200,000. *After a windfall profit*, X Corporation has earned $200,000 in operations so that its initial capital of $400,000 is restored to it. X Corporation then liquidates. A receives one-half of the then existing net assets, or $200,000, consisting of all capital, his pro rata portion of then existing net assets. A has actually realized a gain of $100,000; yet according to the Assessor, would not be taxable at all because the corporation had no accumulated earnings at time of liquidation.

Obviously the District of Columbia taxing statutes should not be construed to levy a tax (1) when no gains are realized or (2) when gains are realized from the disposition of capital assets, as the same are defined under local law (assets held for more than two years).

It may therefore be seen that the taxing system sustained by the taxing authorities below is so arbitrary and capricious and leads to such absurd results as to be in violation of the due process clause of the Fifth Amendment of the Constitution, from the protection of which the citizens of the District of Columbia, as distinguished from the citizens of the several states, are not to be excluded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDICES A AND B FOLLOW

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,024

HENRY A. BERLINER, PETITIONER,

v.

DISTRICT OF COLUMBIA, RESPONDENT.

No. 14,025

JOSEPHINE M. BERLINER, PETITIONER,

v.

DISTRICT OF COLUMBIA, RESPONDENT.

No. 14,026

ROBERT B. FRANK, Trustee for CORA A. BERLINER CUNNINGHAM, PETITIONER,

v.

DISTRICT OF COLUMBIA, RESPONDENT.

No. 14,027

ROBERT B. FRANK, Trustee for JOSEPHINE L. BERLINER VARGAS, PETITIONER,

v.

DISTRICT OF COLUMBIA, RESPONDENT.

No. 14,028

ROBERT B. FRANK, Trustee for HENRY A. BERLINER, JR., PETITIONER,

v.

DISTRICT OF COLUMBIA, RESPONDENT.

On Petitions for Review of Decisions of the District of Columbia Tax Court

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Decided May 1, 1958

Mr. Bernard I. Nordlinger, with whom *Messrs. Milton W. King, Wallace Luchs, Jr., Robert B. Frank* and *Charles Kershenbaum* were on the brief, for petitioners. *Mr. W. David Huddle* also entered an appearance for petitioners.

Mr. Henry E. Wixon, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Chester H. Gray*, Corporation Counsel, *Milton D. Korman*, Principal Assistant Corporation Counsel, and *Douglas H. Moore, Jr.*, Assistant Corporation Counsel, were on the brief, for respondent.

Before Fahy, Washington and Danaher, Circuit Judges.

Washington, *Circuit Judge*: These cases arise under the income tax laws of the District of Columbia. They present the question whether amounts distributed in complete liquidation of a corporation, to the extent that those amounts exceed the cost of the stock and represent corporate earnings, are properly includible in the stockholders' gross income as a dividend under Section 47-1551c(m) of the District of Columbia Code (1951).

In 1937 the petitioners became common stockholders in the Engineering & Research Corporation ("Erco"), each paying to the company the full par value for his or her shares. On November 15, 1954, Erco sold its assets and business to ACF Industries, Inc. ("ACF"), for $3,000,000,[1] realizing a profit of $2,196,371.46 on the sale. On that date Erco had an earned surplus of $613,628.54, a substantial part of which represented earnings in 1954. Following the sale the profit of $2,196,371.46 also was reflected in and became a part of its earned surplus account. In December of 1954 Erco distributed to its common stockholders, pro

[1] This amount was paid in substantial part in cash; the balance was made up by the issuance of 10,000 shares of ACF stock, valued at the stock's market value on the date the contract was closed. In addition to the payment of $3,000,000 for the assets, ACF assumed all of Erco's liabilities, with the exception of certain items specifically excluded by the sale contract.

rata on the stock owned by each, the cash and the ACF stock acquired on the sale of assets, reserving only the amounts required to retire its preferred stock and to pay liabilities not assumed by ACF. It was stipulated that, after excluding the amount of capital included in the distribution,[2] the remainder was paid out of surplus acquired from operating profits up to November 15, 1954, and surplus acquired from the proceeds of the sale of its business to ACF. Erco charged the distribution, after excluding the capital, to earned surplus; it had no paid-in or capital surplus.

In their 1954 income tax returns to the District of Columbia, the petitioning stockholders reported the distribution as a sale or exchange of their stock, a capital asset, resulting in a non-taxable gain. Deficiencies for 1954 were assessed against them, computed by including in taxable income as a dividend under Section 47-1151c(m) of the Code the amount distributed by Erco in complete liquidation, less an amount representing return of capital.[3] The taxpayers paid the taxes so assessed and petitioned for refunds. The District of Columbia Tax Court approved these assessments and denied refunds of the taxes so paid. The present petitions followed.

Section 47-1557a(a) of the Code includes "dividends" within the definition of gross income. Section 47-1551c(m) defines a dividend as—

> "any distribution made by a corporation (domestic or foreign) to its stockholders . . ., out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property . . . and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: . . ."[4]

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[2] *I.e.*, an amount equal to the original capital paid in (the par value of their common stock) by the stockholders.

[3] See footnote 2.

It was stipulated in writing before the Tax Court that the distribution, to the extent taxed, was paid out of surplus, and the evidence showed that Erco had only earned surplus, to which the distribution was charged. The taxpayers made no contention to the contrary here.[5] The

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[4] A proviso to this section reads as follows:

> "*Provided, however*, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution. . . ."

The only part of the dividend here involved which was distributed other than in cash was stock of ACF (not common stock of Erco), which was valued at its market value on the date of distribution as the proviso directs. Taxpayers have pointed out no provision of the income tax law, and we know of none, which exempts a dividend paid in property other than cash or stock of the same class in the paying company, here stock of another company, from tax. Taxpayers do rely on the provisions excluding from gross income the gains on sales or exchanges of capital assets, which will be discussed *infra*. Suffice it to say here that such exclusion provisions do not relate to the exemption from tax of the type of dividend referred to in the proviso.

[5] Such a contention would not be sustainable. There was a gain by the corporation on the sale of its assets. For Federal tax purposes that gain may not have been taxable (*cf.* INT. REV. CODE of 1954, § 337(a) and (b)), and if not recognized as taxable income would not be regarded as increasing Erco's earned surplus by virtue of a specific statutory enactment (INT. REV. CODE of 1954, § 312(f)(1)). But the District statute has no such provision as to the effect on earned surplus. Furthermore, we are not advised as to the status of the gain for District corporate income tax purposes. If the assets sold had been held for more than two years *and* if they were not stock in trade or inventoriable properties or held primarily for sale to customers in the ordinary course of the corporation's business, they would be capital assets as defined in D. C. CODE § 47-1551c(1) and would be excluded from the statutory definition of gross income by D. C. CODE § 47-1557a(b)(11). The corporation's balance sheet on the date of sale should very substantial inventories so that at least a substantial part of the assets sold were not capital assets of the corporation, as defined by stat-

distribution made by Erco, during or upon its liquidation, was thus out of "its earnings, profits, or surplus," earned in part from operations and in part on the sale of its assets in 1954. As such, it falls precisely within the statutory language and the imposition of the tax was required.

The correctness of this view is confirmed by reference to the history of the related Federal taxing provisions.[6] Commencing with the Revenue Act of 1916,[7] c. 463, 39 STAT. 757 (1917), a dividend was defined generally as any distribution out of earnings and profits accumulated after

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ute, and would have been within the broad definition of income contained in D. C. CODE § 47-1557a(a). *Cf.* Commissioner v. Court Holding Co., 324 U. S. 331 (1945); Eisner v. Macomber, 252 U. S. 189, 207 (1920). If some part of the assets sold were within the definition of capital assets of the corporation, which the evidence does not show, and thus were excluded from its income by the statutory definition of gross income, the gain allocable to such part would nevertheless probably be regarded as increasing its earned surplus account in the absence of a statutory provision or regulation to the contrary. *Cf.* Commissioner v. F. J. Young Corp., 103 F. 2d 137 (3d Cir. 1939); Commissioner v. Wheeler, 324 U. S. 542, *rehearing denied*, 325 U. S. 892 (1945); 1 MERTENS, LAW OF FEDERAL INCOME TAXATION, §§ 9.32 and 9.38 (1956). In any event, the stipulation as to the source of the distribution makes such considerations unnecessary here.

[6] See generally 1 MERTENS, LAW OF FEDERAL INCOME TAXATION, §§ 9.63, 9.64, 9.66, 9.87, 9.88, and 9.89 (1956); Darrell, *Corporate Liquidations and the Federal Income Tax*, 89 U. OF PA. L. REV. 907-09 (1941).

[7] Section IIB of the Revenue Act of 1913, c. 16, 38 STAT. 167 (1915), the first act after adoption of the Sixteenth Amendment, included "dividends" in gross income without attempting to define them. Lynch v. Turrish, 247 U. S. 221 (1918), and Lynch v. Hornby, 247 U. S. 339 (1918), were decided under this Act. Read together, they seem to indicate that the Court construed the word "dividends" in that Act as referring to dividends paid in the ordinary course and as not including amounts distributed in complete liquidation of a corporation. But such a construction is not controlling here, where the statutory provisions are different.

February 28, 1913,[8] with certain additions not relevant here, and this definition has continued until the present time.[9] The 1918 Act, the 1924 Act (but not the 1921 Act), and all subsequent acts including the present Code,[10] provide specifically that amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock. Under such specific provisions a liquidating distribution is treated as the proceeds of an "exchange" resulting in gain or loss to the stockholder-recipient, even though the distribution may include corporate earnings and profits, and even though without the specific provision the broad definition of dividends would include distributions in liquidation. See *Hellmich* v. *Hellman*, 276 U.S. 233, 236-237 (1928); *White* v. *United States*, 305 U.S. 281 (1938); *Helvering* v. *Weaver Co.*, 305 U.S. 293 (1938). But in the Revenue Acts of 1916, 1917, and 1921 there was no such specific provision as to the treatment of distributions in complete liquidation. In cases governed by those acts it has been uniformly held that distributions in liquidation, whether partial or complete, fell within the definition of a dividend to the extent that they represented accumulated earnings, and thus were properly taxable as a dividend.[11] The holdings under the 1921 Act

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[8] March 1, 1913, was the effective date of the first revenue act following ratification of the Sixteenth Amendment.

[9] See INT. REV. CODE of 1954, § 316(a).

[10] INT. REV. CODE of 1954, § 331(a)(1).

[11] Under 1916 Act: A. B. Nickey & Sons, 3 B.T.A. 173 (1925).
1917 Act: James Dobson, 1 B.T.A. 1082 (1925); *cf.* Vincent v. McLaughlin, 61 F. 2d 657 (9th Cir. 1932), *petition for certiorari dismissed*, 288 U. S. 618 (1933).
1921 Act: Commissioner v. Sansome, 60 F. 2d 931 (2d Cir.), *cert. denied sub nom.* Sansome v. Burnet, 287 U. S. 667 (1932); Phelps v. Commissioner, 54 F. 2d 289 (7th Cir. 1931), *cert. denied*, 285 U. S. 558 (1932); Leland v.

are especially significant: they construed the general definition of a dividend unequivocally to include distributions of earnings in a liquidation, where the specific provision of the 1918 Act that distributions in liquidation are to be treated as paid in exchange for the stock was omitted from the 1921 Act. See particularly *Commissioner* v. *Sansome*, *supra*, note 11, at 932, and *McCaughn* v. *McCahan*, *supra*, note 11, at 4.

The District statute contains virtually the same definition of a dividend as the Federal statutes have contained since the 1916 Act, with the significant addition that in the District statute Congress included a specific provision that the term "dividend" includes a distribution of earnings "during, upon, or after liquidation."[12] Had Congress intended that such a distribution be treated as an exchange, we think it would have omitted the reference to liquidating distributions in the definition of a dividend and would have included a provision similar to that which has appeared in the Federal statutes uninterruptedly since 1924. We must therefore reject the taxpayers' contention that

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Commissioner, 50 F. 2d 523 (1st Cir.), *cert. denied*, 284 U. S. 656 (1931); McCaughn v. McCahan, 39 F. 2d 3 (3d Cir. 1930); Hamilton Woolen Co., 21 B.T.A. 334 (1930); Frank D. Darrow, 8 B.T.A. 276 (1927); *cf.* Holmquist v. Blair, 35 F. 2d 10 (8th Cir. 1929).

[12] See Section 47-1551e(m), above quoted. The provision with which we are here concerned was enacted in 1947. Previously, the 1939 tax act defined the word "dividend" as "any distribution made by a corporation out of its earnings and profits . . .", and provided:

> "It includes such portion of the assets of a corporation distributed at the time of dissolution as are in effect a distribution of earnings." See D. C. Code, § 47-1543(16) (Supp. V, 1956).

The change in the 1947 Act seems to us to have been adopted to eliminate the necessity of a finding that a distribution is "in effect" a distribution of earnings, when some of the assets distributed represent earned surplus.

the transaction should be held to be an exchange, the gain from which is excluded from gross income by Section 47-1557a(b) (11).[13]

The petitioners recognize that the statutory definition of a dividend is broad enough to include the liquidating distributions to them, after capital is excluded. But, petitioners argue, the statutory language should not be applied literally here to tax as a dividend the part of the distribution which represents earnings, because to do so would lead to results not intended by Congress. The foregoing discussion demands rejection of this argument. We note, however, that Congress was undoubtedly cognizant that either method of treatment might present some problems in application, *cf.* Magill, *The Income Tax Liability of Dividends in Liquidation*, 23 MICH.L.REV. 565, 566-568 (1925), and that it purposely selected the method of taxing liquidating distributions of earnings as dividends for purposes of the District tax. The wisdom of such a choice is obvious, when the provisions of the District law relating to capital gains (D.C. CODE §§ 47-1551c(1) and 47-1557a(b) (11)) are considered. If distributions like the present were treated as sales or exchanges of stock, as taxpayers argue they should be, some stockholders (those who had owned their stock for more than two years) would escape tax altogether on receipt of the corporate earnings whereas other stockholders would be taxed in full on receipt of exactly the same distribution of earnings merely because they had held their stock for only two years or less. Such a difference in treatment for the same distribution would hardly be justified by logic—and, as we read the statutes, Congress has not authorized it. The argument that the dis-

[13] It is here relevant to note that if these distributions are considered to be "gains from the sale or exchange of any capital asset," as defined in D. C. CODE §§ 47-1557a(b)(11) and 47-1551c(1), they would escape District tax entirely. This is in contrast to the Federal statutes which do not exempt capital gains but tax them in a special way. See INT. REV. CODE of 1954, § 1201 *et seq.*

tributions "grew out of" the ownership of stock would be equally applicable to any distribution of earnings, including dividends in the ordinary course paid by corporations not in liquidation, and is hardly persuasive as a reason for holding these distributions not within the literal statutory language.

Finally, the taxpayers contend that the Fifth Amendment prohibits taxation as dividends of amounts distributed in liquidation to the extent that they represent corporate earnings. Their argument is two-fold: that to do so taxes the stockholder on the earnings of another entity, the corporation, and that it arbitrarily and capriciously provides a different treatment from that afforded stockholders who sell their stock to third persons. The first point, if accepted, would prohibit the taxation of any distribution of corporate earnings to a stockholder as a dividend. But, of course, the point cannot be accepted. *Cf. United States* v. *Phellis*, 257 U.S. 156, 169 (1921). In respect of the taxpayers here the argument overlooks the fact that the distributions not only returned to them their capital investments in full but also a substantial additional amount as a gain or profit. The question is whether the Fifth Amendment permits Congress to tax this profit as dividend income, when it also represented a distribution of corporate earnings. The courts have frequently recognized that a distribution of earnings in liquidation may rationally be treated as a dividend as well as an exchange.[11] It was constitutionally open to Congress to elect to tax the profit as a dividend for purposes of the District tax, just as it was constitutional for it to do so for purposes of the 1921 Federal Act. *Commissioner* v. *Sansome*, *supra* note 11, at 932. *Cf. Neild* v. *District of Columbia*, 71 App. D.C. 306, 110 F.2d 246 (1940).

To be sure, this method of taxation provides a different treatment from that accorded to stockholders who sell

[11] *See, e. g.*, cases cited in fn. 11; Hellmich v. Hellman, 276 U. S. 233 (1928); Magill, *supra*, 23 Mich. L. Rev. at 566-568.

their stock to third persons. But such a sale does not involve a distribution by the corporation of its earnings and capital in liquidation, and has no element of a dividend, unlike the distributions here.[15] It thus cannot be thought to be unreasonable or arbitrary to treat sales of stock to third persons as sales and to treat distributions in liquidation as dividends to the extent that earnings are included—although such considerations are probably not relevant for purposes of the Fifth Amendment. *Neild v. District of Columbia*, *supra* at 318-320, 110 F.2d at 258-260.

Affirmed.

DANAHER, *Circuit Judge*, dissenting: Deficiencies in income tax were asserted by the Assessor against the petitioners as individual resident taxpayers who had received cash and securities upon the liquidation of Engineering and Research Corporation, a Maryland Corporation (ERCO), in which they had been stockholders.

An income tax may be levied upon the "net income" of a taxpayer resident in the District, to be sure, but the words "net income" are defined to mean "the gross income of a taxpayer less the deductions allowed by this article." D. C. CODE § 47-1557 (1951). In turn, the words "gross income" by definition include, in part, income derived from "dealings in property, whether real or personal, *other than capital assets*," D. C. CODE § 47-1557(a) (1951) (Emphasis supplied.) Certainly the shares in the hands of the stockholders constituted "capital assets,"[1]

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[15] We do not think that the same could necessarily be said of a sale of stock back to the issuing corporation itself. It may be that in some circumstances such a sale would amount to a partial (or even a complete) liquidation. We make no comment as to the possible tax consequences of a sale by the stockholders of all ERCO stock to another corporation, such as ACF.

[1] Garrett v. District of Columbia, 81 U. S. App. D. C. 374, 159 F. 2d 457 (D. C. Cir. 1946), *cert. denied*, 330 U. S. 835 (1947).

whatever the value of those shares might be, since they were "held by the taxpayer for more than two years." D. C. CODE § 47-1551(c)(1) (1951). The Code further provides that "gains from the sale or exchange of any capital asset as defined in this article" are capital gains, D. C. CODE § 47-1557(b)(11) 1951).[2]

The Tax Court concluded that the cash and securities distributed by ERCO constituted "dividends" within the meaning of D. C. CODE § 47-1551c(m) (1951), which in pertinent part reads:

> "(m) The word 'dividend' means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), *whenever earned by the corporation* and whether made in cash or any other property . . . and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: *Provided, however*, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and *not exempted from tax under this article*, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution . . ." (Emphasis supplied.)

It seems to me that the key to the foregoing section, as here applied, must be found in the language "whenever earned by the corporation." I think the District Code, as amended in 1947, had been simply drawn, and intentionally so, in contradistinction from the far more complicated Internal Revenue Code. The draftsmen sought to reach a liquidation, whether it be partial or complete. They sought to avoid the many complications such as have arisen under the federal law.

The draftsmen knew that distributions "in kind" have given rise to myriad problems under the federal law.

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[2] The general definitions in the Code "are the generally accepted ones for the words defined." S. REP. No. 280 to accompany H.R. 3737, Vol. 2 Senate Reports (1947) 80th Cong. 1st Sess.

See, *e.g.*, *Commissioner of Internal Rev.* v. *Hirshon Trust*, 213 F.2d 523 (2 Cir. 1954), *cert. denied*, 348 U.S. 861 (1954). Thus, for the purposes of the tax law of the District of Columbia, as to distributions "in kind," they added the proviso, above noted, defining the taxpayer's "basis" but only as to property so distributed which is "not exempted from tax." Surely Congress did not stultify itself by this deliberately selected language in this very section.

To recapitulate, Congress sought simply to class as dividends to stockholders the distribution of *earnings*, whenever paid out, and whether in complete or partial liquidation or dissolution or otherwise. Reverting to the definition of "dividend," we see that its reach applies to a distribution by a corporation of its property, whether it be cash or otherwise, if that distribution is made "out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation."[3]

I see no complexity inherent in the sweep of this language. The Tax Court said in its opinion that "There can be no doubt that all of such items, with the exception of the $190,000 capital item, were surplus." Thus the Tax Court treated the entire sum, whether in cash or stock, paid by ACF to ERCO other than paid-in capital, as "surplus," and hence as a dividend or "surplus" income to the stockholders. I believe its error stems from its loose and all-inclusive classification of "surplus," without regard to the type of surplus. Obviously, the Code itself

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[3] Cases are D. C. Code § 47-1543(16) (1940):

> "The word 'dividend' means any distribution made by a corporation out of its *earnings* or *profits* to its stockholders or members whether such distribution be made in cash, or any other property, other than stock of the same class in the corporation. It includes such portion of the assets of a corporation distributed at the time of dissolution as are in effect a *distribution of earnings*." (Emphasis added.)

excludes "paid-in surplus." The term certainly must be taken to exclude unearned surplus, or that represented by appreciation in value. Mr. Justice Brandeis makes the point for me in his opinion in *Edwards* v. *Douglas*, 269 U.S. 204, where at 214 he says:

> "The word 'surplus' is a term commonly employed in corporate finance and accounting to designate an account on corporate books . . . The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. This surplus may be 'paid-in surplus,' as where the stock is issued at a price above par. [In our case paid-in surplus is specifically excluded.] It may be 'earned surplus,' as where it was derived wholly from undistributed profits. [In our case, I deem at least $613,628.54 to be "earned surplus," specifically subject to tax.] *Or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company's fixed property.*" (Emphasis supplied.)[4]

I think the case should be remanded to the Tax Court for a determination of the several elements as separately distinguished by Mr. Justice Brandeis. The words "surplus . . . whenever earned by the corporation" have not here been broken down by evidence of record.

The petitioners had been arguing that no part of the sum paid by ACF was subject to the deficiency tax here asserted. Yet it is perfectly clear that as at December 31, 1953, there was an earned surplus balance of $54,241.64. Again, the corporation between January 1 and November 15, 1954, had net income of $559,386.90. Surely these two items constituted earned surplus, within the

[4] So it was that the parties stipulated that over and above repaid capital, amounts received by the stockholders were "paid and delivered out of *surplus* of [ERCO] and to have been acquired by said corporation from (1) its operations commencing January, 1937, and terminating November 15, 1954, and (2) the *proceeds of sale of its business* to ACF . . ." (Emphasis supplied.)

meaning of the Code, subject to tax, when distributed, as "dividends." Exclusive of capital, the balance was represented by notes and accounts receivable, buildings and other fixed depreciable assets and inventories. There were contracts, work in process and other elements, no doubt. We do not know what they are or the value ascribed to them.

In short, between January, 1937, and November, 1954, the stockholders saw their capital investment grow. No doubt, some earnings were ploughed back. No doubt, some dividends were paid. But the experience of the corporation was one of progress. Its good will was enhanced. Its potential for doing business was expanded. Its management developed a product in demand under Government contract—for all we know, the only such company in the nation in a specialty field.[5] The value of the stock increased accordingly in the hands of its holders, irrespective of what elements contributed to that enhanced value. Thus, it was that invested capital of $190,000 by the time of the ACF transaction represented asset value of $3 million. That amount, in what appears to have been an arm's-length transaction, was what ACF agreed to pay. The stockholders bound themselves expressly by contract not to use the ERCO name, or any similar name, and not for five years to compete with ACF, or even indirectly to become interested in a competitor. ACF saw value in that restriction and ERCO's shareholders were entitled to compensation for it. The contract with ERCO bound ACF to pay $3 million, and ERCO was bound to transfer and did transfer "all of Seller's then existing assets and business, as a going concern, including, without limitation, all rights to the use of the name Engineering and Research Corpora-

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[5] As to the nature of at least some of ERCO's business, see Greene v. McElroy, ——— U. S. App. D. C. ———, ——— F. 2d ——— (D. C. Cir. April 17, 1958).

tion (or any variant thereof) and all patents, applications for patents, trade-marks and licenses."[6]

Then, upon liquidation, ERCO's stockholders surrendered their stock. They exchanged the value back of that stock for $3 million. To the extent that the amounts received thereafter constituted a distribution of surplus *earned* by the corporation, such amounts were dividends under the Code section here applicable. To the extent that such amounts so distributed reflected value, not earned, they also were properly carried on ERCO's books as surplus, possessing, within the meaning of the Code, a capital asset value when related to the stock in the hands of the shareholders. Whatever the exact tax consequences may be depends upon the elements back of that valuation, to be measured in terms of what portion was earned, and on this point no findings have been made. That there was some capital gain to the shareholders seems beyond peradventure.[7]

My colleagues recognize, I see, that if these stockholders had sold their stock to a third person, there would be no income tax because there would be no "dividend," as they construe the term. That is the way the law clearly points, they concede. Presumably the same result would follow had the stock been sold to ACF. Yet they observe that unless their construction of the term "dividend" is here adopted, these stockholders will likewise not be required

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[6] ERCO's contract to sell its business in which the stockholders individually joined, bound ERCO to transfer to ACF net assets of not less than "$586,429, the net worth of Seller as disclosed by its [balance sheet]. The term 'net assets' of Seller as used in this Section shall be deemed to mean the book value of the assets of Seller less its liabilities, including in liabilities all reserves and accruals but *excluding capital* and *surplus accounts*." (Emphasis supplied.)

[7] I do not explore the extent to which these stockholders may be liable to federal taxes because of the distribution, and, of course, we have not considered at all the various aspects of ERCO's liability to the Government.

to pay an income tax on the unearned asset value included in the ERCO "surplus."

I think the result they deplore reflects precisely the purpose of the statute which presents a policy question with which we are not concerned. The 1947 amendment expanded the earlier language[8] so as to reach earnings or profits distributed upon liquidation or dissolution, but otherwise made no change in the principle. If a "dividend" in a corporate liquidation is not a distribution of corporate earnings, but represents only a return of unearned increment, the stockholders have received no more *in value* than they had before surrendering their stock. They have merely exchanged their capital, the shares being evidence of their ownership, for the valuation itself, whether it be distributed in dollars or in property. The Code reaches corporate distributions out of *earnings*, whether distributed currently in a given tax year as a "dividend" in the usual sense, or declared but not paid until later, or earned, but not distributed at any time until either by a partial or complete liquidation or dissolution. Thus equality of tax treatment is accorded to District residents as to *income* from corporate earnings. It seems to me the scheme of the statute in these several respects is completely clear.[9]

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[8] See note 3 *supra*.

[9] The Assessor had issued no regulations which spell out the term "dividend." I am confident my colleagues will not wish to be understood as saying that a "dividend" as they define it will result in taxability as though upon income if a stockholder takes a loss when a corporation upon liquidation returns *less* than his invested capital. The point is arguable, nevertheless. I read the majority opinion as intended to deal only with the distribution of amounts which "exceed the cost of the stock and represent corporate earnings." I have sought to make clear for my part that "surplus" may mean a great deal more than what has been earned by the corporation, and may include amounts which "exceed the cost of the stock." There must be hundreds of corporations in the District—not to mention corporations located elsewhere—whose

In sum, when the statute says that gross income shall not include capital gains resulting from the sale or exchange of capital assets as defined in the Code, it seems to me to assimilate that portion of the District law to the federal law with years of experience behind it. Thus shareholders in the District who wish to *speculate* must treat as ordinary income, gains on transactions in capital assets held for less than two years. But *investors*, who through a corporation help build asset value and whose holdings appreciate due to many valid causes, some, perhaps, wholly fortuitous, are bound upon liquidation of the corporate medium to pay a District income tax only upon such "surplus" as shall have been earned by the corporation. Whatever may be the tax liability of shareholders, such as these, to the federal Government, I think their District liability has expressly and purposefully been limited.

I would remand for a determination of whatever facts may measure District income tax liability according to the criteria I have suggested.[10]

stock is owned by District residents, the holdings of which are concentrated in real estate, or oil properties or mining ventures, for purposes of illustration, which vastly appreciated in value in recent years. That increment in value is *surplus*, largely unearned. See Edward v. Douglas, *supra*.

[10] See Commissioner v. Munter, 331 U. S. 210, 216, 217 (1947).

APPENDIX B

§ *47-1557. Net income.*

For the purposes of this article and wherever appearing herein, unless otherwise required by the context, the words "net income" mean the gross income of a taxpayer less the deductions allowed by this article. (July 16, 1947, 61 Stat. 335, ch. 258, Art. I, Title III, § 1.)

§ *47-1557a. Gross income and exclusions therefrom.*

(a) The words "gross income" include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

(b) The words "gross income" shall not include the following:

* * * * * * * * * *

(11) *Capital gains.*—Gains from the sale or exchange of any capital asset as defined in this article. (July 16, 1947, 61 Stat. 335, Art. I, Title III, § 2; May 3, 1948, 62 Stat. 207, ch. 246, § 3; May 27, 1949, 63 Stat. 130, ch. 146, Title IV, §§ 403, 420.)

§ *47-1551c. General definitions.*

For the purposes of this article and wherever appearing herein, unless otherwise required by the context—

* * * * * * * * * *

(l) The words "capital assets" mean any property, whether real or personal, tangible or intangible, held by the taxpayer for more than two years (whether or not connected with his trade or business), but do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the end of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(m) The word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: *Provided, however,* That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution: . . . (July 16, 1947, 61 Stat. 332, Art. I, Title I, § 4; May 3, 1948, 62 Stat. 206, ch. 246, §1; May 27, 1949, 63 Stat. 129, ch. 146, Title IV, §§ 401, 402.)

§ *47-1595. Commissioners to prescribe and publish rules.*

The Commissioners shall prescribe and publish such rules and regulations, consistent with the provisions of this article, as may be necessary and proper for its enforcement and efficient administration. (July 16, 1947, 61 Stat. 359, ch. 258; Art. I, Title XVI, § 1.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1025

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Petitioners,

v.

DISTRICT OF COLUMBIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE CASE

In 1937 petitioners acquired, at a cost of $100 per share, common stock in a Maryland corporation known as Engineering and Research Corporation (hereinafter called ERCO). The total sales of shares of common stock issued by the corporation was 100, of which petitioners owned 90, and one Lester Wells, who is not a party to this proceeding, owned 10 (R. 5, 22). On November 8, 1954, ERCO entered into a contract with ACF Industries, Inc., a New

Jersey corporation (hereinafter called ACF) to sell to ACF all of ERCO's assets and business for the sum of $3,000,000 which was to include the market value of ten thousand shares of $25.00 par value full paid and non-assessable common stock of ACF to be computed on the basis of the closing price of that stock on the New York Stock Exchange on the last business day upon which that stock should be sold on the exchange immediately preceding the contract closing. On November 15, 1954, pursuant to the contract of November 8, 1954, ERCO consummated the sale of its business and assets to ACF Industries (R. 12, 22). Thereafter, ERCO conducted no business, and carried on no activities except those incident to its liquidation and dissolution (R. 23). At the time of the sale on November 15, 1954, ERCO had earned surplus on its books of $613,628.54 and capital stock of $190,000.00 of which $180,000.00 was represented by preferred stock and the remainder by the common stock held by petitioners and Wells (R. 25-26). Following the sale by ERCO to ACF on November 26, 1954, ERCO adopted a resolution directing the officers of ERCO to distribute, before January 1, 1955, to the stockholders of ERCO, all of its assets except an amount retained to meet claims. This resolution also authorized the officers of ERCO, as soon as practicable, to proceed with the dissolution of ERCO. On December 9, 1954 and December 21, 1954, ERCO, pursuant to resolutions of its board of directors and stockholders, distributed pro rata to petitioners and to Wells the assets of ERCO consisting of cash and the 10,000 shares of stock in ACF (R. 7, 23). On December 27, 1954, following the distribution to the shareholders of all of the assets of ERCO, ERCO was dissolved (R. 7, 25). The profit realized by ERCO on the sale of its assets to ACF was $2,196,376.46, which was reflected in ERCO's books as earned surplus. ERCO's 1954 Federal income tax return reported the distributions made by it to its stockholders following the sale as distributions out of earned surplus (R. 25-26, 9, 19). The total amounts distributed to

petitioners, exclusive of the amounts received by Lester Wells, was $2,312,248.50, including the cash value of ACF stock also distributed to petitioners. Of this amount, $9,000.00 represented a return of capital for the common stock held by petitioners, and the remainder was paid and delivered out of the earned surplus of ERCO acquired from its operations to November 15, 1954, and the proceeds of sale of ERCO's business to ACF Industries (R. 10, 24).

Section 4(m), Article I, Title I of the District of Columbia Income and Franchise Tax Act of 1947, as amended, 61 Stat. 328, ch. 258 (Section 47-1551c(m), D. C. Code, 1951), defines, for District of Columbia individual income tax purposes, a dividend as:

> "* * * any distribution made by a corporation (domestic or foreign) to its stockholders or members, *out of its earnings, profits, or surplus* (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property * * * and whether distributed *prior to, during, upon, or after liquidation or dissolution of the corporation*: * * *". (Italics supplied)

Section 2, Article I, Title III of the District of Columbia Income and Franchise Tax Act of 1947, *supra*, (Section 47-1557a(a), D. C. Code, 1951) specifies that for the purposes of the Income and Franchise Tax Act gross income includes "dividends * * * or gains or profits, and income derived from any source whatever".

Based upon the provisions of the District Income Tax Act, petitioners were assessed and paid District of Columbia individual income taxes upon the amounts distributed to them by ERCO, exclusive of the return of capital as represented by the common and preferred stock. Thereafter, petitioners appealed to the District of Columbia Tax Court alleging there that the assessments of individual income taxes against them were invalid (R. 26, 27). That

court affirmed the assessments of taxes against petitioners and held that they were not entitled to refunds of those taxes (R. 27-53). The United States Court of Appeals for the District of Columbia Circuit, to which petitioners appealed from the decisions of the Tax Court against them, affirmed the Tax Court's decisions (R. 72).

SUMMARY OF ARGUMENT

The statute involved in this case is limited to the District of Columbia and does not present a question of sufficient importance to justify a modification of the position of this Court that it will not, except in extraordinary cases, review decisions of the United States Court of Appeals for the District of Columbia Circuit based upon statutes limited to the District of Columbia.

Contrary to the position of petitioners, the District statute which petitioners attack accords with the due process requirement of the Fifth Amendment to the Constitution, and contains language substantially equivalent to language in Federal Revenue Acts considered and approved in numerous cases by Federal Circuit Courts of Appeal.

ARGUMENT

The Petition Should Be Denied

This case involves the liability of petitioners for an individual income tax under the District of Columbia Income and Franchise Tax Act, of 1947, as amended (61 Stat. 328, ch. 258), a statute which, although enacted by the Congress of the United States, is limited in its operation to the District of Columbia. Ordinarily, as this Court has stated, this Court will not review decisions of the United States Court of Appeals for the District of Columbia which are based upon statutes limited in their operation and effect to the District of Columbia. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285.

Petitioners paid a District of Columbia individual income tax upon earned surplus distributed to petitioners by Engi-

neering and Research Corporation in which petitioners owned stock. The United States Court of Appeals for the District of Columbia Circuit, in an extensive opinion, concluded that the tax paid by petitioners was properly assessed against petitioners under the District of Columbia Income and Franchise Tax Act of 1947, *supra*, and that objections raised by petitioners to the tax on the basis of the Fifth Amendment could not be sustained. In reaching its conclusions, the Court of Appeals compared the District's statute with substantially identical provisions in Federal statutes enacted by the Congress for the purposes of Federal revenues and said: "It was constitutionally open to Congress to elect to tax the profit as a dividend for purposes of the District tax, just as it was constitutional for it to do so for purposes of the 1921 Federal Act. * * *". (R. 54, 63).

Petitioners cite *Lynch* v. *Turrish*, 247 U. S. 221, and *Lynch* v. *Hornby*, 247 U. S. 339, in support of their contention that receipt of proceeds of liquidation from a corporation does not constitute receipt of a dividend (Pet. for Cert. 11). But both of these cases were considered by the United States Court of Appeals in reaching its decision and that Court rejected the contentions of petitioners for the reason that *Lynch* v. *Hornby* and *Lynch* v. *Turrish* involved language in the Revenue Act of 1913, 38 Stat. 167, different from that contained in the District of Columbia Income and Franchise Tax Act of 1947. Thus, the construction by this Court of the Revenue Act of 1913 in the cases cited is not applicable. (R. 58). Moreover, as the Court of Appeals observed, it was uniformly held by the courts in construing the Internal Revenue Act of 1921 that the general definition of a dividend, as contained in that act, included the distributions of earnings in a liquidation, just as does the District of Columbia Income and Franchise Tax Act of 1947. (R. 59-60) The fact that the District Tax Act specifically includes, as dividends, distributions in liquidation, was considered significant by that Court, It stated:

> "* * * Had Congress intended that such a distribution be treated as an exchange, we think it would have omitted the reference to liquidating distributions in the definition of a dividend and would have included a provision similar to that which has appeared in the Federal statutes uninterruptedly since 1924." (R. 60-61)

Petitioners urge that the imposition of the taxes here in question is prohibited by the Fifth Amendment. This amendment, and not the Fourteenth, is applicable in the District of Columbia. *Wight* v. *Davidson*, 181 U. S. 371. A claim of unreasonable classification or inequality in the incidence or application of a tax does not raise a question under the Fifth Amendment. *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463.

Even if the due process clause of the Fifth Amendment could be invoked, the discrimination complained of would have to be extreme or devoid of a reasonable basis. *Detroit Bank* v. *United States*, 317 U. S. 329; *Steward Machine Co.* v. *Davis*, 301 U. S. 548. No such showing, as the Court of Appeals held, is made by petitioners here.

CONCLUSION

It is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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